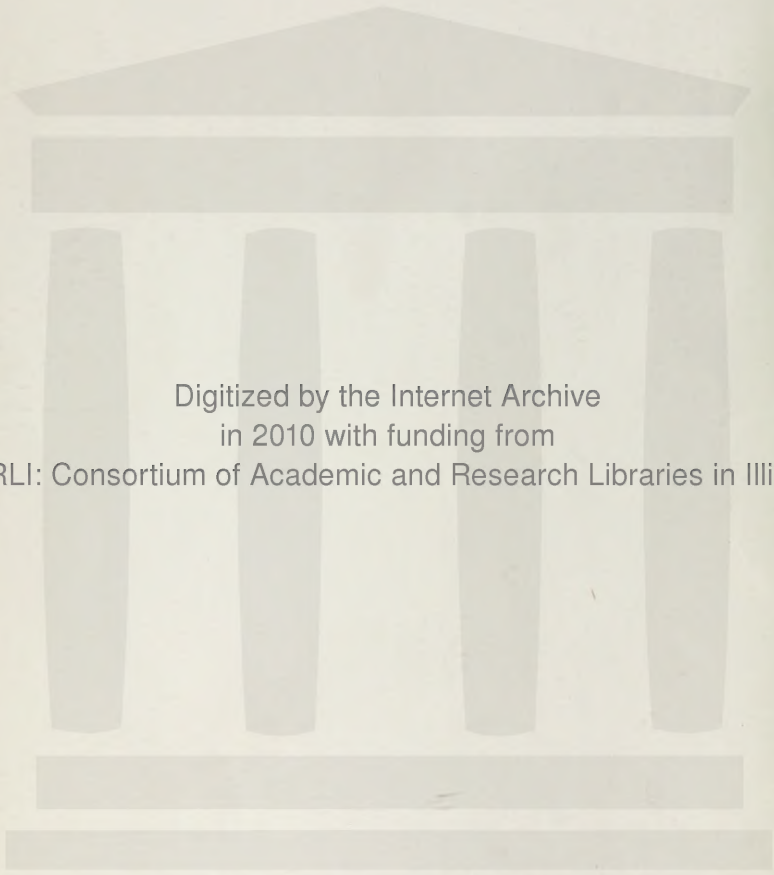
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Gen. No. 6654. October Term, A. D. 1916. Ag. No. 57

J. A. Clark, Appellee,

vs.

M. O. Lee, Appellant.

Appeal from Circuit Court Vermilion County.

205 I.A. 1

Eldredge, J.

This is an action brought by appellee against appellant for fraud and deceit in which appellee recovered a judgment for $1500. The case was tried under an amended declaration consisting of three counts with a plea of the general issue. The first count alleged that appellant together with one Cozart was engaged in the selling of certain shares of the capital stock of the Tishomingo Tie & Stone Co; that appellant and said Cozart came to appellee's store for the purpose of selling stock in said company; that appellant for the purpose of inducing appellee to purchase said stock, fraudulently and falsely represented to appellee that appellant was the owner of a large amount of the capital stock; that said company on, to-wit, the 1st day of July, 1915, would pay a dividend on said stock of at least 15 per cent; that said stock had a book value of $200 per share and unless appellee would immediately buy said stock it would be too late within a very few day to acquire it at the price of $150 per share; that said stock would sell in the near future at a premium and result in large dividends to appellee; that said company was employing a large number of men at its plant at Merom, Indiana, and was making a large amount of railroad ties; that contracts were in the hands of said company and that information of various character was on file in the office of said company whereby

all cement and concrete ties that the company could possibly make would be readily sold to railroad companies as ties and that the profit on each tie manufactured was the sum of $1; that the only purpose for selling said stock at the present time and at the present low price was due to the fact that said company had let contracts for the building of a branch factory near La Fayette, Indiana, requiring an investement of $75,000 and the money received from the sale of said stock would be placed in the treasury of said company and used for said purposes; that the profits of the said company were such that it would declare a 15 per cent semi annual dividend and that appellant was a large stock holder and knew the facts concerning the representations then made to appellee, and that all said facts were true; that arrangements had

been made whereby the remaining stock would be purchased by certain investors and capialists in Chicago and that said company would give to all those who already had stock in said corporation a one-half share for each share that they already owned; that appellee relying upon said representations and believing them to be true bought 15 shares of said stock and paid $2250 for the same.

The second count is substantially the same as the first count. The third count charges the false representations to be as follows: that said stock had a book value of $200 per share not counting it patents; that said stock was worth $200 per share; that said company had a deed for 80 acres of land in Sullivan County, Indiana, on which its factories were located and that the land with the gravel thereon, was worth the par value of the stock; that the business of said company then showed profits sufficient to pay a 15 per cent semi annual dividend on it's stock; that said company was employing a large number of men at its place near Merom and was making a large amount of railroad ties; that contracts were in the hands of said company whereby all the ties it could make would be

sold to railroad companies and that said company would make a profit of $1 off of each tie; that appellant at the time said representations were made was a neighbor of appellee and had appellee's confidence and represented that he, appellant, had bought a large amount of stock in said company, was a director of said company, had investigated the company; knew all the facts of which he spoke and made all the representations aforesaid as of his own knowledge whereas in truth and in fact appellant did not know the said representations to be true and carelessly and recklessly made them as of his own knowledge not then knowing whether said representations were true or false; that appellee beleiving said representations to be true and relying on them and by reason thereof purchased of appellant 15 shares of the capital stock of said company and paid $2250 therefor; that said representations aforesaid and all of them were in fact false and untrue and the appellant by then and there so recklessly making said representations as of his own knowledge and without knowing whether they were true or false, did deceive and defraud appellee and induce him to purchase said stock which appellee would not otherwise have done; that said stock is worthless and of no value.

On the trial, the books of the company were admit-

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ted in evidence over the objection of appellant upon the testimony of the witness Lang. The witness testified that the books he produced were sent by express to the clerk of the Court by Ryder the president of the Tie Company, and by the clerk delivered to the Citizens Trust Company which had been appointed receiver of the Tie Company. The witness was the secretary of the Citizen's Trust Company. He further testified that he did not know the amount of the capital stock of the company; that he had not inventoried the assets and liabilities of the company; that the Trust Company took the books just as they appeared; that those offered in evidence were not all of the books of the company; that there were some more down home; that he didn't

known of his own knowledge whether they were in fact the books of the company or not; that he knew nothing about them except that they were sent up and delivered to the Trust Company by express.

It is apparent that the witness did not produce all the books of the Tie company and that he did not know as a matter of fact that those produced were in fact the books of the Tie company. His testimony in substance amounted only to this: that the Trust Company of which he was secretary received by express certain books a portion of which he produced in court. It is too clear for argument that there was no identification even of the books introduced in evidence and that they were incompetent under these circumstances for any purpose. They were introduced for the purpose of proving that at the time the stock was sold to the plaintiff it was worthless.

This witness also produced a lease in which the Tie Co., was the lessee of certain real estate. This lease was received in the same manner and at the same time as the books. It was introduced in evidence, over the objections of the appellant, to prove the fact that the Tie Company did not own or have a deed of the property on which its factory was built. The witness did not know whether the buildings of the Tie Company were erected upon the premises described in the lease or not and there was no evidence in the record tending to show that the Tie Company did not own or have a deed to the lands on which its factory was constructed. It is assumed by counsel for appellee that the mere fact that among the papers sent to the Trust Company, there happened to be a lease wherein the Tie Company, was the lessee of certain premises is proof that the Tie

Company, did not own or have a deed to the land on which its factory was constructed. Even if the premises had been identified as the same as those on which the factory was built, it would not necessarily follow that the Tie Company, did not own the land as it might have acquired title to it subsequent to the lease.

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There was no competent evidence tending to show that the stock was worthless at the time it was purchased by appellee, or what its value was at that time, nor was there any competent evidence tending to prove the allegations in the declaration that the company did not own or have a deed to the property on which its factory was built.

The second instruction told the jury that if they believed from the evidence that plaintiff had made out his case as laid in his declaration or any count thereof it must find for the plaintiff. It is urged that this instruction was erroneous for the reason that the third count did not set out a cause of action because it omitted to state that defendant had knowledge that said representations were false. The third count charges that appellant recklessly made the false representations as of his own knowledge without knowing whether they were true of false with intent to deceive and defraud appellee. This count states a good cause of action. Miller vs. John, 208 Ill. 173. We cannot concur in the contention that instruction 5 could have mislead the jury in assuming that the representations referred to therein were false. The instruction states a correct proposition of law in regard to when the value of stock may be a material fact but it was error to give it in this case for the reason that there was no competent evidence on the question of the value of the stock. Instruction 7, to have been technically correct, should have included the necessary element that appellee had been damaged by such false representations. Instruction 10 is bad for the reason that it assumes that the representations made by appellant were false and fraudulent. Instruction 14 attempts to set out what false representations were material and enumerates among others the statements, that the stock had a book value of $200 and that said Tie Company owned 80 acres of land. As has been

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stated before there was no evidence tending to show the value of the stock nor that the Tie Company did not own the land, therefor there was no evidence on which to base this instruction in regard to the particulars mentioned. Instruction 15 is liable to be misleading as as-

suming that the representations made were false, particularly in view of the fact that several other instructions were subject to this objection.

It is contended by counsel for appellant in a general way that the court erred in permitting leading questions to be propounded to a number of witnesses. The objectionable questions are not presented in the brief nor any reference made to the abstract where they may be found and we assume they were of no importance or they would have been presented for our consideration in the proper manner.

The other errors urged are either without merit or have been disposed of by what has already been said. The judgment is reversed and cause remanded.

2787

Gen. No. 6656. October Term, A. D. 1916. Ag. No. 59.

City of LaHarpe, Appellee,

vs.

George Watts, Sr., Appellant.

Appeal from the County Court of Hancock County

205 I.A. 3

Eldredge, J.

This case was tried in the County Court of Hancock County on appeal from a judgment in Police Magistrate's Court of LaHarpe.

The complainant charges appellant with violating section one of Ordinance No. 88 entitled "An Ordinance of the City of LaHarpe concerning dram shops, wholesale stores, and the sale of intoxicating liquors, and for other purposes therein named," passed September 16, 1903.

Section 1 and 14 of Ordinance No. 88 are as follows:

> "Section 1. Be it Ordained by the City Council of the City of LaHarpe, that no person or persons shall, in said city, sell, exchange or give away any whiskey, ale, beer, brandy, rum, gin, cider, wine or other vinous, malt, fermented, spirituous or intoxicating liquor or any beverage or drink in which any of the aforesaid liquor is mixed or contained, or any other intoxicating liquor of any kind, in any quantity whatever, without first having obtained a license or permit from the City Council of said city, and then only in the manner herein set forth, and in strict compliance with the terms of such license or permit, and the regulations and requirements of the City Council of said City, and all ordinances that are now and may hereafter be in force concerning such sale, and the laws of the state of Illinois concerning dram-shops and the sale of intoxicating liquors; and any person or persons whether by himself, agent, clerk or employe; who shall violate any of the provisions of this section shall, upon conviction thereof, forfeit and pay to said city not less than twenty dollars nor more than two hundred dollars for each and every offense."
>
> "Secton 14: That whenever the City Council of said city shall elect to grant a license to keep a dram-shop or license to sell intoxicating liquors at wholesale only, or to wholesale beer only, or to grant permits to druggist as hereinafter set forth they, the said council at the time of granting any of said licenses, shall determine and fix the amount of the license fee to be paid in each and every case by resolution of said council, provided, however, that said license so fixed shall be uniform and the same as to all persons applying for license to conduct any of the aforesaid business, and the whole of said license fee to be paid in each and every case in advance and shall be granted for the balance of the municipal year. And provided that dram-shop keepers shall pay at not less than at the rate of five hundred dollars and shall not extend beyond the close of the municipal year of the life of the council granting the same."

Appellant was convicted and adjudged to pay $160.00 and costs. He relies for reversal on the following claimed errors:—

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"First. That the ordinance in question is void for failure to fix the amount of the fee to be charged for saloon licenses.

Second: That the ordinance in question was suspended while the city of LaHarpe was anti-saloon territory under the provisions of the "Act of the Legislature of the State of Illinois relating to anti-saloon territory."

It is admitted that the city of LaHarpe was anti-saloon territory at the time of the occurrences charged against appellant as a violation of the ordinance referred to. It is also true that when the ordinance in question was passed the city of LaHarpe was "wet" and that the ordinance was passed for the purpose of licensing saloons in that city, under certain restrictions.

It is apparent from an examination of the record that this case was tried on the theory that the ordinance was in force and that a license to sell intoxicating liquor issued under it would be a valid license and authorize the sale of such liquors in the city of LaHarpe notwithstanding that the city was within anti-saloon territory.

The Supreme Court in the **Peopel v. Mount** 186 Ill. 560 held that a license ordinance purporting to authorize the city authoritites to issue a license to run a dram shop, in which the price to be paid for the same from the time is is issued until the end of the term for which is granted, is not definitely fixed is void for that reason

In Section 14 of the ordinance here under consideration there is no attempt made to fix the amount so to be paid. The ordinance is void under the holdings in the Mount case, and a license issued under it would afford no protection to the holder of it. **Curry v. City of Aurora** 175 Ill. App. 57, **Backhaus v. The People** 87 Ill. App. 173. In the last

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case cited it is expressly held that a city cannot by resolution fix the amount to be charged as a fee to be paid for a saloon license.

Even if the ordinance was valid as such, its operation is suspended while the city of LaHarpe is within anti-saloon territory. During that period the ordinance is as inoperative as if it never had been passed. Paragraph 4644 Jones and Cunninghams' Statute provides:

"In all anti-saloon territory, during the time that it continues to be anti-saloon territory, the operation of all ordinances providing for restriction, regulation or prohibition of the sale of intoxicating liquor of such territory, so far as inconsistent with its status as anti-saloon territory, shall be suspended."

The license ordinance from which the first and fourteenth section is above quoted is manifestly inconsistent with the status of the city of LaHarpe as anti-saloon territory. The law concerning anti-saloon territory prohibits the sale of liquor there, while the ordinance in question expressly provides for the issue of saloon licenses. The conclusion is irresistible. The ordinance in question stood suspended while the sales occured that are made the basis of this prosecution. The prosecution should have been had in the name of the People of the State and under the law by which the anti-saloon territory was created.

The judgment of the County Court must be reversed and because the ordinance in the City of LaHarpe under which this prosecution was begun stands suspended and no conviction under it can be upheld, the cause will not be remanded.

Judgment reversed.

2770

Gen. No. 6657. October Term, A. D. 1916. Ag. No. 60.

G. B. Gones, Appellee,

vs.

Illinois Printing Co., a Corporation, J. G. Fisher and Newton Shields, Appellants.

Appeal from Circuit Court Vermilion County

205 I.A. 5

Eldredge, J.

Appellee recovered a judgment for the sum of $5000 against the Illinois Printing Company, a corporation, J. G. Fisher and Newton Shields, jointly for personal injuries. The case was tried upon an amended declaration consisting of five counts and a plea of general issue thereto.

It is averred in the first count that on or about the 19th day of January, 1915, the Illinois Printing Company, a corporation, carelessly and negligently, by and through its servant, Newton Shields erected and built in N. Walnut St., in the city of Danville, which run in a northerly and southerly direction, and in W. North St., which runs in an easterly and westerly direction, N. Walnut St., being 30 ft. wide and W. North St., being 45 feet wide,) a high board fence at the south-east corner at the intersection of said streets, 10 feet high and which extended 15 feet from the east curb of N. Walnut St., and 15 feet from the south curb of west North St., toward the centers of said streets and that said fence occupied not only said portions of said streets but also the sidewalks thereon, and then and there constituted a nuisance in violation of an ordinance of the city of Danville in which it is declared to be a public nuisance to encroach upon or obstruct any street, alley or public ground with any building,

fence or structure of any kind and provides the penalty of a fine of from $3 to $100 for a violation thereof; that said fence was a public nuisance, an obstruction and rendered said streets extra hazardous and dangerous because of the fact that they were thereby narrowed at said intersection to such a degree as to make meeting, passing or approaching vehicles apt to collide; that plaintiff was on said day riding a bicycle and proceeding north on N. Walnut St., near said intersection and approaching the same from the south, and said defendant, Fisher, was then and there approaching from the west and was carelessly and negligently operating an automobile at a high and dangerous rate of speed, to-wit, 20 miles per hour; that said intersection is in the closely built up district of said city and by reason of the negligence of Fisher in operating said

automobile at said high and dangerous rate of speed in violation of law and by reason of said fence in said street the plaintiff was unable to turn aside on W. North St., to escape said automobile and said automobile ran into and against him knocking him upon the pavement and dragging him for a distance of 100 feet east of said intersection by reason of which he was injured; that plaintiff was just before and at the time of said accident in the exercise or ordinary care and caution for his own safety. The other counts are substantially the same with the exception that the third and fifth counts allege that plaintiff had the right of way over the automobile of defendant Fisher by reason of Section 18 of an ordinance of said city which provided that all vehicles going in a northerly or southerly direction shall have the right of way over vehicles going in an easterly and westerly direction except on Main street where vehicles going in an easterly and westerly direction shall have such right of way, and that said defendant, Fisher, in violation of said ordinance failed to give the plaintiff the right of way.

The only allegation connecting defendant Shields with the

case in any of the counts is the averment that the Printing Company, carelessly and negligently "by and through its servant Newton Shields, erected and maintained the fence," etc. This does not charge Shields personally with any negligence and wholly fails to state any cause of action against him. Klawiter vs. Jones, 219 Ill. 626. Neither is there a scintilla of evidence that could in any way fix any liability upon Shields even if the declaration had been sufficient to charge liability on his part. The evidence tends to show that the Printing Company, was building a new three story building on the southeast corner of N. Walnut and W. North streets in the city of Danville and that Shields had charge of the construction of this building. For the purpose of constructing the building, Shields submitted the plans and specifications to the Superintendant of Buildings of the city and made application for a permit to occupy and use one third of W. North and N. Walnut streets and the city council on August 25, 1914 granted his request and a permit was issued to him to expire October 31, 1914. Thereupon he built the fence across the sidewalk and for 15 feet into each street for the purpose of using this space for materials in the construction of the building and to prevent injury to pass-

ersby. On October 24, 1914, before the permit had expired Shields left the employment of the Printing Company and was not connected thereafter with the construction of the building. The accident did not happen until January 1915, and it is inconceivable how he could in any manner be liable therefor. The declaration does not set out any cause of action against him nor do the proofs tend to show any.

As against the Printing Company it is claimed a cause of action can be sustained for the reason that it permitted the fence to remain after the permit therefor had expired, and the fence thereby became an obstruction to the street and a nuisance under the ordinance. The cases of West Chicago Masonic Association vs. Cohn, 192 Ill. 210

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and Kenyon vs. Chicago City Railway Co., 235 Ill., 406 are cited as sustaining this proposition. This isa mistaken view of the law announced therein. The fence in question was not intended to be a premanent obstruction to the street and the cases cited by appellee are cases of permanent obstructions in the streets constituting purprestures therein. While the public has a paramount right to the use of a public street this right is not absolute but relative. In the case of Tolman & Co., vs. Chicago, 240 Ill. 268, this subject is exhaustively treated and the right of abutting property owners to temporarily obstruct a part of the street is very clearly expounded, and it is held that in the improvement, erection or repair of buildings and the construction of drains and sewers therefor, or of other adjuncts, the placing of building materials in the street preparatory to building on the land, are not unlawful obstructions to the street. The necessity for using the street need not be an absolute but it is sufficient if it be a reasonable one.

In the case at bar the Printing Company had the right, regardless of any permit from the city, to temporarily obstruct a part of the streets in question for the purpose of constructing its building if it was reasonably necessary to do so. The fact that the limit of time fixed in the permit for the obstruction had expired when the accident happened did not make the obstruction wrongful since the obstruction was one which the Printing Company had a right to make without the permit. No ordinance or facts are pleaded showing that any such permit was required.

Under the facts it is difficult to see how the fence in any way contributed to the accident and much less

to be the proximate cause thereof. The fences were on the east side of N. Walnut street and on the south side of W. North street and did not join at right angles but the corner was cut off. The automobile driven by the defendant Fisher was coming from the west on W. North St., and plain-

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tiff testified that as he was riding his bicycle along the east side of N. Walnut street going toward the north he could see the automobile 200 feet west of the intersection of the two streets; that he rode on and thought the automobile would stop because he had the right of way, that when the automobile struck him he was 4 or 5 feet north of the fence on W. North street and going in a northeasterly direction. It is claimed that the fence on N. Walnut street prevented him from turning east on W. North street and thus avoid the automobile. The only way the automobile could have collided with him under these circumstances would have been to have driven it against the fence but the evidence shows it was proceeding down the middle of the street. There is no evidence tending to show that the fence was the proximate cause of the injury and under the evidence in this case the fact that the permit had expired did not make the fence the proximate cause of the injury. Kepperly vs. Ramsden, 83 Ill. 354.

On behalf of defendant Fisher it is contended that numerous errors were committed in the admission and exclusion of evidence, also in refusing to give the 15th instruction offered on his behalf. We find no reversable errors in the rulings on the admission of evidence. The 15th instruction mentioned stated the rule in regard to the exercise of due care on the part of the plaintiff and the rule of law announced therein was fully covered by the other instructions given. It is also urged that the verdict as against Fisher is contrary to the evidence. As the judgment must be reversed and cause remanded for another trial on account of the error hereinbefore mentioned we refrain at this time from passing upon the weight of the evidence as applied to defendant Fisher.

The judgment is against all the appellant jointly and consequently must be reversed as to all appellants. Seymour vs. Richardson Fueling Co., 205 Ill. 77; South Side Electric Railroad Co., vs. Nesoig, 214 Ill. 463.

The judgment is reversed and cause remanded.

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direct casual relationship to his death or that the verdict is not sustained by the evidence.

Appellant further insists that the court erred in the ing of two instructions. The contentions are that the first instruction assumes that the deceased had a diseased condition of the blood vessels by reason of which his death would be more easily caused by an injury such as he received, and that there was no evidence on that question. The part of the instruction complained of is:"if you believe from a preponderence of the evid nce that the said William Klage had any diseased condition of the blood vessels by reason of which his death would be more easily caused by an injury like the one in question," etc. The instruction is not an assertion of a diseased condition, but clearly leaves it to the jury to find from the evidence whether or not there was such a condition of the blood vessels. The evid nce tended to show that the deceased had hardening of the arteries and that for that disease complete rest and quiet is the best remedy. One doctor testified he"would not expect any tendency of trouble to come from it where the patient had been quiet several days." There is much evidence in the case on which to base the instruction, not however, in the language of the instruction but from which such facts might reasonably be inferred. A similar complaint is made concerning appellee's second instruction, but upon a careful examination we find it is not subje ct to the criticism made. Finding no error in the record, the judgment is affirmed.

Affirmed.

2791

Gen. No. 6664. October Term, A. D. 1916. Ag. No. 63.

J. H. Wallace, et al. Appelees.

vs.

Citizens State Bank, of Windsor, et al.

Appellants.

Appeal from Circuit Court Shelby County

205 I.A. 7

Eldredge, J.

J. H. Wallace, W. H. Ownby, J. A. Erwin, C. C. Firebaugh, and Ruth Wallace Firebaugh, filed their bill which was subseqently amended, in the Circuit Court of Shelby County against the Citizens State Bank of Windsor, Illinois and the officers and stockholders thereof other than appellee, for a mandatory injunction. The defendants filed a demurrer to the amended bill setting out four special causes therefor: (1) that the amended bill shows on its face that there was a misjoinder of parties complainant and defendant; (2) that the complainants have no such right, title or interest in the subject matter of the cause as to entitle them to the relief prayed for; (3) that the bill is multifarious; and (4) that complainants have an adequate remedy at law. The demurrer was overruled, and the defendants thereupon filed their joint answer to the bill which subsequently by leave of court they withdrew, and abided by their demurrer to the amended bill. Thereupon the court defaulted defendants for want of answer and entered a decree granting the relief prayed for, to reverse which this appeal is taken.

Such averments of the bill as are necessary to be considered are in substance as follows: That said Bank is organized under the banking laws of Illinois with a capital stock of $25,000 consisting of 250 shares of the par value of $100 each; that W. H. Ownby,

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acting for A. C. Crays and A. T. Collison, purchased of J. W. Grissom 126 shares of the capital stock of said Bank and there was issued to said Ownby 3 certificates of said capital stock as follows: Certificate No. 26 for 10 shares, certificate No. 27 for 50 shares; certificate No. 28 for 66 shares; that while Ownby was the legal owner of said 126 shares and the said Grissom having resigned as one of the directors of said Bank, the Board of Directors thereof refused to elect the said Ownby director and elected M. W. Walker a director to fill the vacancy caused by the resignation of said Grissom, and thereafter the Board of Directors consisted of M. W. Walker, G. W. Rogers, S. A. Walker, H. E. Munson and W. R. Duncan;

that on September 28, 1914, the said 126 shares, as represented by the three certificates aforesaid, were sold by said Crays and Collison, who in fact owned the same at that time, and for whom Ownby sold the stock, to the complainant J. H. Wallace, and the said Wallace paid to the said Crays and Collison for said stock the sum of $12,406; that before that time the said Ownby had endorsed and assigned said certificates in blank and had the name of J. H. Wallace was inserted in the blank as-delivered the same to said Crays and Collison with direction to fill in the blanks, with the name or names of any person or persons whom they desired to have the stock transferred to, and that on September 28, 1914, signment which was signed by Ownby on back of said certificates, which assignment was so endorsed on each of said certificates as follows:

> For value received, I hereby sell, assign and transfer unto J. H. Wallace, shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint the Cashier to transfer the said stock on the books of the within named Corporation with full power of substitution in the premises. Dated September 28th, 1914.
>
> W. H. Ownby.

That as a result of said endorsement and assignment the said Wallace became the owner of said 126 shares of said stock and that said Wallace afterwards on the 29th day of September, 1914, sold 10 shares thereof to the complainant J. A. Erwin, sold 10

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shares to the complainant C. C. Firebaugh and gave 10 shares to the complainant Ruth Wallace Firebaugh who was the daughter of said J. H. Wallace, and that said Wallace then and there endorsed upon the certificate numbered 27 aforesaid an endorsement of 10 shares to each of said complainants, Erwin, Firebaugh and Ruth Wallace Firebaugh as is shown by the endorsement thereon as follows:

> For value received, I hereby sell, assign and transfer unto Ruth Wallace ten (10) shares of stock represented by the within Certificate and to J. A. Erwin ten (10) shares of stock represented by the within Certificate, and to C. C. Firebaugh ten (10) shares of stock represented by the within certificate, and do hereby irrevocably constitute and appoint the Cashier to transfer the said stock upon the books of the within named corporation, with full power of substitution in the premises.
> Dated September 28th, 1914.
>
> J. H. Wallace.

That as a result of said sales and endorsements, Wallace is the onwer of certificates No's. 26 and 28 and that

complainants Wallace, Erwin, Firebaugh and Ruth Wallace Firebaugh are the owners of certificate No. 27, Erwin, Firebaugh and Ruth Wallace Firebaugh each owning 10 shares thereof and, Wallace owning 20 shares thereof; that on the 10 day of October 1914, the complainants, other than Ownby, presented said certificates to said Bank and to M. W. Walker cashier thereof, and asked leave to surrender the said certificates and have new certificates issued to complainants for said stock and made written demands that this be done and presented the said demands in writing to the said Bank and said cashier and sent by mail a copy of the written demand to S. A. Walker, President, and to Rogers the Vice President of said Bank and offered to pay the charges for making the transfer of said stock and for the issuance of said stock certificates to the complainants and for the recording of the said certificates in reference thereto as required by law: (here follows the written demands set out in **haec verba;)** that the officers of said Bank without justification fraudulently and willfully refused to accept the surrender of the said certificates and to transfer the same upon the books of the Bank and to sisue to said complain-

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ants, other than said Ownby, the certificates therefor; that after the refusal to accept the surrender of said certificates and to issue new certificates as aforesaid, certain suits were brought in the Circuit Court of Shelby County to compel the officers of said Bank so to do, but were all dismissed without prejudice; that since the dismissal of said suits complainants have all made demands upon the officers of the Bank to transfer said stock to complainants, other than said Ownby; that said Ownby has made a personal request on said Walker, the cashier, to transfer said stock and has offered to transfer the same on the books of the Bank if the said Walker would not do so; that on December 30, 1915, the complainants presented to said Walker, cashier as aforesaid, a written demand to transfer the said stock certificates (here follows the written demand so served upon the cashier as aforesaid set out in **heac verba** and signed by all of the complainants;) that at the time said demand was made said Wallace tendered to the said Walker the sum of $630 in gold in payment of an assessment that had been made by the Auditor of Public Accounts of the State of Illinois against the said 126 shares of the capital stock of said Bank, the said Auditor having made an assessment of $5 a share against all the stock of said Bank to cover

impairment thereof, and offered to pay the same provided the transfer of said stock was made as requested and demanded, and said Ownby and said Wallace offered to make the transfer on the books of said Bank and an offer was made to do anything and everything to be done to make the transfer, but the said Walker as such cashier refused to make the transfers and refused to allow the said Ownby or Wallace to make said transfers; that complainants attempted to find said S. A. Walker the President of said Bank, on the 30th of December 1915, but were unable to find him but they did find said Rogers the then Vice Persident of said Bank and gave to him a copy of said written notice and demand and requested that he transfer the said stock but he refused so to do. That complainants

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on the 5th day of January, 1916, in the bank building of said Bank with all the Directors of said Bank present, and who also constituted all of the officers of said Bank, renewed their demand and request that the transfer of said stock represented by certificates No's. 26, 27 and 28 be made, and offered the original certificates of said stock to be surrendered and transferred on the books of said Bank and again presented the notice and demand heretofore referred to, and delivered to the officers of said Bank, who were all present, another copy of the same and complainant Wallace then and there tendered the sum of $630 in gold to pay the said assessments provided the said transfers were made as requested in said demand, which said sum of $630 has been brought in to court and deposited with the Clerk thereof to be turned over to said Bank whenever the transfers were made to complainants, other than Ownby, and the complainants Wallace and Ownby not only tendered the said money but offered to make whatever transfers were necessary to be made on the books of the said Bank, and complainants offer to do whatever else in equity they should do as the court may order them to do. That said Ownby told said Walker, cashier as aforesaid that if the said Walker would not act as attorney in fact for him, the said Ownby, that he the said Ownby, would make the transfers upon the books of said Bank and offered then and there to make the said transfers and complainants Wallace made the same offer but said Walker refused to make said transfers and stated that he would not recognize the said stock in any way; that complainants offered to pay the $630 in gold which was then and there brought into court; that the Bank is not doing fiancially as well as it

should and that this controversey is injurious to said Bank; that if the law suits be brought and several trials be had that it will add much more cost and expense and to save a multiplicity of suits and to settle all these matters in one suit this action is brought; that the same is brought for the purpose of protecting all the rights of all the parties who are made parties to the suit; prays that the officers

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of the Bank may be ordered to make the transfers in accordance with the rights of the respective parties complainant etc.

It is a well established rule of law that, as between the parties, the transfer of stock by delivery of the certificates with power of attorney or endorsed in blank, passes title without transfer on the books of the company even when the by-laws of the company provide to the contrary, and that such blank transfer may be filled up with the name of a remote transferee and the name to be inserted concerns only the purchaser. McCarthy vs. Crawford, 238 Ill. 38. The law is also well established that a bank is but the custodian of the shares of its stock and as such trustee it is its duty to transfer on its books shares of stock to the owner of the actual title and issue to him certificates for the same, and this duty may be enforced in a court of equity. In the case of Allmon vs. Salem Building Ass'n. 275 Ill. 336. it was held,

> "But a corporation is by law the custodian of the shares of its stock and clothed with power sufficient to protect the rights of everyone interested therein from unauthorized transfers, and, like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its negligence or misconduct in making transfers or cancellations of such stock. Where certificates are outstanding representing shares of stock, it is the duty of the corporation to resist any transfer of such share on its books without the production and surrender of the certificates. A violation of this duty renders the corporation liable to the real owner of the shares for their conversion, and it is so liable to **bona fied** holders for value of the old certificates. (10 Cyc. 614, 617; Hall vs. Rosehill and Veanston Road Co., 79 Ill. 673.) Equity will compel a corporation, under proper circumstances to transfer on its books shares of stock to the owner of the equitable title and issue to him certificates for the same. (10 Cyc. 605.)"

The complainants had complied with every condition imposed upon them by law for the transfer of the certificates, and it was the duty of the bank to make the transfers.

The objection that the bill is multifarious is untenable as all of the complainants except Ownby are inter-

ested in one of the certificates, each owning a portion of the shares represented

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therein. Moreover complainant Wallace had the right to surrender said certificates and have new certificates made out for smaller numbers of shares in the names of any one whom he saw fit and it was proper for all the owners of the shares represented by said certificates, to join in having a proper transfer of said stock made upon the books of the Bank. It is contended that there is a misjoinder of the parties for the reason that the assignment on certificate No. 27 was to Ruth Wallace and that the bill does not aver that said Ruth Wallace was the same person as Ruth Wallace Firebaugh. It is strenuously insisted by appellees that the court cannot consider this assignment of error for the reason that it was not presented or called to the attention of the court on the hearing in the court below and an opportunity given to complainants to amend their bill to correct the error, and affidavits have been filed to this effect. This court cannot take notice of said affidavits must decide the question raised upon the record before it. One of the special causes of the demurrer was that there was a misjoinder of parties complainant and there is nothing in the record to show that this point was not considered by the Chancellor in the court below. However we think that the allegations in the bill are sufficient to charge that Ruth Wallace was in fact Ruth Wallace Firebaugh. The bill avers that the complainant J. H. Wallace gave 10 of the shares represented by certificate No. 27, to Ruth Wallace, who was his daughter and also avers that as a result of the said assignment and endorsement on said certificate, complainants Wallace, Erwin, Firebaugh and Ruth Wallace Firebaugh became and are the owners of certificate No. 27, Erwin, Firebaugh and Ruth Wallace Firebaugh each owning 10 shares thereof and Wallace owning 26 shares, the said certificate numbered 27 being for 50 shares of capital stock of said Bank. The written demands served upon the Bank and its officers which are made a part of the bill state emphatically that by said assignment Ruth Wallace Firebaugh became the owner of 10 of the shares represented by certificate No. 27. There can be no question but that by these averments the Ruth Wallace

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mentioned in the written assignment and endorsement on the back of certificate No. 27 was intended to

be and was in fact Ruth Wallace Firebaugh.

The facts stated in the bill, which are admitted to be true by the demurrer, show a flagrant violation of the rights of the majority of the stock holders by the minority. There are no merits in the objections to the bill and the demurrer thereto was properly overruled. The decree is accordingly affirmed.

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Gen. No. 6668. October Term, A. D. 1916. Ag. No. 66.

Marietta Kitchen, Appellant.

vs.

George E. Weatherby, Appellee.

205 I.A. 10

Appeal from Circuit Court

Macon County

Eldredge, J.

Appellant brought an action of trespass on the case against appellee and her declaration consists of two counts which are substantially the same and aver, in substance, that the defendant, George E. Weatherby, was the owner of a certain automoblie kept and used by defendant for the business and pleasure of himself and his family; that the defendant by Donald Weatherby, his agent, and member of his family, was driving said automobile along East North street in the city of Decatur and that he carelessly, negligently and recklessly drove the same at a higher and more dangerous rate of speed than was reasonable, having regard for the traffic and use of said street; that while plaintiff, with all due care and caution for her own safety, was riding in an automobile owned and driven by her husband upon and along the intersection of said E. North street with N. Jasper St., in said city, the defendant so carelesssly and negligently and recklessly managed and drove, by his said agent, his automobile, that the same collided with and struck the automobile in which plaintiff was riding; by reason whereof she was injured.

At the close of plaintiff's evidence the court instructed the jury to find the defendant not guilty. Appellant prosecutes

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this appeal to reverse the judgment rendered on said verdict.

It is contended by appellant that the law is that a son who has the right and permission of his father to use an automobile, which the latter has provided for the comfort and pleasure of the family, is acting as the servant of the father, so as to make the latter liable for injuries caused by his negligent act when he uses the automobile for the pleasure of himself or friends. This rule seems to be supported by the following cases: Birch vs. Abercrombie, 74 Wash. 486; Hays vs. Hogan, (Mo.) 165 S. W. 1125; Marshall vs. Taylor, 168 Mo. App. 240; Smith vs. Jordan, 211 Mass. 269; Hieroux vs. Baum, 137 Wis. 197; Stowe vs. Morris, 147 Ky. 386; Parker vs. Wilson, (Ala.) 69 So. 150; Kayser vs. VanNest, 125 Minn. 277; Ploetz vs. Holt, (Minn.) 144, N. W. 745; Winnifrey vs. Lazarus, 148 Mo. App. 388.

On the other hand it is contended by appellee that the fact that the automoblie was owned by him and was driven by his son even with his consent does not establish the relation of master and servant and the fact that his son is driving his parent's automobile for his own pleasure does not make the parent liable for the son's negligence, and the following cases are cited as sustaining this position. Brohl vs. Lingeman, 41 Mich, 709; Maher vs. Benedict, 108 N. Y. Supp. 288; Lamana vs. Stevens, (Del.) 93 Atl. 962; McFarlane vs. Winters (Utah) 157 Pac. 437; Reynolds vs. Buck (Ia.) 103 N. W. 946; Loehr vs. Abell (Mich.) 140 N. W. 926; Dorran vs. Thomsen, (N. J.) 71 Atl. 296; Roberts vs. Schanz, 144 N. Y. Supp. 824.

While the rule at common law that the parent is not liable for the torts of a minor child obtains in this state, yet the liability of a father for the negligence of a member of his family in using an automobile owned and kept by him has never been passed upon in any of its phases by the Supreme Court of this state, and it is unnecessary for us to undertake to determine that question in this case for the reason that the proofs fail to bring this case

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even within the rule invoked by appellant. The only evidence in the record in regard to the authority of Donald Weatherby, to use the automobile is that given by appellee who was called as a witness on behalf of appellant. That evidence as abstracted is as follows:

> "My name is George E. Weatherby, and I am the defendant in this suit. Am forty-seven years old, and my occupation an optomerist. Live at 163 Summit Ave. Have three children; Donald, Lucile and Earl. They live at home with me. Have a Hudson Six automobile. It weighs about 2800 lbs. I had owned it about a year at the time of this collision. It is commonly called a touring car.
> Q. For what purpose do you use it?
> A. The same as a car of that kind is used for.
> Q. For yourself and members of your family to ride in?
> A. Yes, sir."

There is no evidence as to whether Donald Weatherby was a minor or adult; that the car was being used on the business of his father; that he had ever received permission from his father to use it; that he was using it at the time with his father's knowledge and consent or that he had ever used it with the consent and knowledge of his father before that time. There is no basis for the claim that the testimony given by appellee, above referred to ,tends to prove that Donald Weatherby had a general permission from his father to use the automobile.

We are of the opinion that the meagre facts appearing in the record in this case are insufficient to show a liability on the part of appellee for the accident and the judgment is therefor affirmed.

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Gen. No. 6677. October Term, A. D. 1916. Ag. No. 72.

The City of Monticello, Appellee,

vs.

Ira Clodfelter, Appellant.

Appeal from County Court Piatt County

205 I.A. 11

Eldredge, J.

Appellee sued appellant in an action of debt. The declaration consists of five counts. The jury found a verdict in favor of appelee upon the first and fifth counts and appellant was fined $50 upon the first and $50 upon the fifth count. The first count charges defendant with selling of intoxicating liquor in violation of a certain ordinance of the city. The fifth count charges defendant with maintaining a nuisance under said ordinance. The city of Monticello was dry territory under the Local Option Act in 1915 when it passed an ordinance, Section 14 of which provides, that whoever shall by himself, or another, within the city, sell any intoxicating liquor etc., shall be fined not less than $50 nor more than $200 for each and every offense. Section 3 of the ordinance provides that all places where any such liquors are sold or kept for sale shall be deemed nuisances and whoever shall keep such a place, shall upon conviction thereof, be fined not less than $50 nor more than $200.

Appellant was engaged in running a restaurant in the city of Monticello, and, in connection therewith, ran a lodging house on the second and third stories of the building occupied by the restaurant and also sold soft or non intoxicating drinks including what was claimed to be cider. The proof is ample to sustain the verdict that the alleged cider was an intoxicating liquor. There is some criticism

made to the rulings of the court in the admission of evidence but we find no reversable error therein. No objections are made to the instructions. The point most seriously urged for our consideration is the contention that the city had no authority to pass the ordinance in question for the reason that the Local Option Act provides that all ordinances for the restriction, regulation or prohibition of the sale of intoxicating liquor so far as inconsistent with its status as anti saloon territory shall be suspended. The ordinance in question was passed after the city became anti saloon territory and its provisions are in no wise inconsistent with its status as anti saloon territory. That a city, located in territory which has become anti saloon territory, has power to make an ordinance prohibiting the sale of intoxicating liquor within the city not inconsistent with the

Local Option Act, and to provide therein for the violation of its provisions, is affirmatively held in the case of City of Decatur vs. Schlick, 269 Ill. 181.

It is further urged that a new trial should be granted because it was discovered after the trial that one of the jurors was mentally unbalanced or **non compos mentis.** On the hearing of the motion for a new trial in the court below several witnesses testified on this question. We have carefully examined the testimony given by the witnesses and do not think it is sufficiently proven that the juror during the trial of the cases was mentally unbalanced to such an extent as to make him incompetent to act as such.

There being no reversable error in the record, the judgment is affirmed.

Gen. No. 6683. October Term A. D. 1916. Ag. No. 77.

Otto Harrold, minor, by Amos Harrold, his next friend, Appellee.

vs.

Clinton Gas & Electric Company, Appellant

Appeal from Circuit Court Dewitt County.

Eldredge, J.

Appellee recovered a judgment against appellant for the sum of $1250 in an action on the case. The amended declaration under which the case was tried consists of three counts and makes appellant and also the National Telephone and Electric Co. defendants. The first count avers that on the 1st day of August, 1914, appellant was engaged in manufacturing and selling electric light and power to consumers in the city of Clinton and in said business used and operated wires strung on poles carrying 1100 volts of electricity; that it was the duty of appellant to operate said wires and system in a safe and secure manner and that regardless of its said duty appellant used wires in an unsafe condition in that it permitted the insulation on the wires to become worn off and the wires to remain bare and unprotected, of which condition appellant had knowledge or by the exercsie of reasonable care could have had such knowledge; that the National Telephone and Electric Company operated and controlled a telephone exchange in said city and used and operated wires strung upon poles and that it was the duty of said Telephone company to use and operate said wires and system in a reasonably safe manner; that regardless of such duty said Te lephone company allowed its wires to hang upon and across and in contact with the wires of appellant while the wires of appellant were in such unsafe

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condition as aforesaid; that by reason of the wire of the Telephone company coming in contact with and lying across the bare and uninsulated wire of appellant there was caused to flow in and upon the said wires of the Telephone company a high and dangerous electric current of 1100 volts; that appellant and the Telephone company carelessly and negligently permitted the said wires of the Telephone company, so charged to lay upon and across the school yard about the building known as the Douglas school in said city for a distance of to-wit: 100 feet, and that both the said companies knew of the dangerous condition of said wires or by the exercise of ordinary care could have known of such condition that appellee is a child of the age of 8 years and on said

date was engaged in playing at childish sports with other children upon the said play ground and school yard while said wire of the Telephone company was then and there lying upon the school ground and in contact with the said wire of appellant as aforesaid and while both of said wires were charged with a high potential and dangerous current of electricity; that while appellee was playing as aforesaid and in the exercise of ordinary care for his own safety he came in contact with said Telephone wire and thereby received such a severe shock that he was severely burned, permanently injured and disfigured and one finger was permanently mained and disfigured and he was caused to suffer great bodily pain and still suffers therefrom and has gone to great expense in attempting to be healed amounting to $400.

The second count charges that it was the duty of appellant to use and operate said wire in a reasonable safe and secure manner and with such care to avoid injury to the public as was commensurate with the danger, yet regardless of its duty, carelessly and negligently used and employed wires which were in and unsafe condition in this, that said appellant permitted the insulation and covering on said wires to become worn off, bare, uncovered and unprotected; that it

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was the

duty of both the appellant and the Telephone company to exercise reasonable care to insulate, cover, protect and maintain said wires at a reasonably safe distance from each other and to keep said wires at a reasonably safe distance over and above the surface grade of the said streets upon and along which they were placed by said defendants and to protect the wires from coming in contact with each other, and from becoming impaired, defective and out of a reasonably safe condition while they were charged with a dangerous electric currnet in such manner as not to injure persons being upon the street, or said play ground. The third count is substantially the same as the first count though the averments are in some what different language.

The facts are uncontradicted and show that the Douglas school building sets in about the center of a plot of ground extending from Main to Washington streets and faces Main street; that the wires of appellant and the Telephone company were carried on poles along the side of E. Main Street, the wires of the Telephone company being about 10 feet above the wires of appellant; that two wires of the Telephone company, ran from one of these poles across the school

yard and entered the school building about 30 feet from the ground; that the wire of appellant in question carried electricity to the amount of 1100 volts and that the insulation thereof had become worn off in places which bare places extended from two inches to several feet long and that this condition of the wire had existed for about a year before the accident; that one of the wires of the Telephon dompany became broken and fell across an uninsulated place on the wire of appellant; and in so falling it also fell across the branches of a tree standing in the school yard and hung down along the side of the tree; that appellee who was about 8 years old was playing with a rubber ball on the street and the ball bounced into the school yard; that he ran into the school yard to get it and in stooping over to pick it up, placed his hand against the side of the tree, touched

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the wire and received the charge of electricity; that he was rendered unconscious and received burns on his back, under his arms, on the bottom of his feet and the first finger of his left hand near the joint at the tip was burned to such an extent that it became somewhat misshapen.

The court directed the jury to find the Telephone company not guilty and the case went to the jury with appellant as the sole defendant.

It is first insisted that a recovery cannot be had against one defendant when the evidence shows that the injury was caused by th ecombined negligence of two defendants. It is a well settled rule that a defendant is liable when it is guilty of the negligence charged without regard as to whether the negligence of another also contributed to the injury. Pressly vs. B. N. R'y. Co., 261 Ill. 622; Postal Telegraph-Cable vs. Likes, 225 Ill. 249. In this connection complaint is made of the giving of the third instructon on behalf of appellant which is as follows:

> "You are instructed as a matter of law that to recover in this case it must be shown by the greater weight of the testimony that the negligent act or omission of the defendant was the cause which produced the injury, if any, but it need not have been the sole cause, nor the last or nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which, in combination with it caused the injury, or that it set in motion a chain of cricumstances and operated on them in contnuous sequence, unbroken by any new or independent cause."

This instruction announces a proposition of law which is fully sustianed by the following authorities;

Keith vs Commonwealth Edison Co., 241 Ill. 252; Waschow vs Kelley Coal Co., 245 Ill. 516; Brunnworth vs Kerens Coal Co., 260 Ill. 202.

The first instruction is as follows:

> "If the jury belive and find from the greater weight of the evidence that the defendant corporation was guilty of negligence as charged in the declaration, and that such negligence was the proximate cause of the plaintiff's injuries, and that the

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> plaintiff was, at the time of receiving such injuries, in the exercse of reasonable and ordinary care for his own safety, then the defendant is liable, and in assessing the plaintiff's damages, you have a right to take nito consideration the character and extent of the injuries he has sustained, if any are proven by the evidence; the pain and suffering endured, if any is proven; the permanent character of his injuries, if the evidence shows the plaintiff to be permanently injured; and you should give him such sum as damages as you believe from the weight of the evidence to be a fair and just compensation for such injuries, not exceeding the amount named in the declaratoin."

It is clamied that this instruction is erroneous for the reason that it permits the jury to assess damages for the earning power of appellee durng his minority dence does not show there were any permanent injuries dence does not show there any permanent injuries exexcept the injury to the finger and the fact that since the accident appellee has been or a nerveous temperment and easily frightened, and the latter being speculative no permanent damages could have been assessed, therefor. The instruction does not mention the subject of the earning power of appellee during his minority nor is there any evidence of such earning power. There is nothing in the instruction nor in the evidence which could led the jury to believe that they were uthorized to assess any damages for such earning power. There was some evidence that since the injury, appellee had been in a nerveous condition and easily frightened. But the jury could not have been mislead into assessing any damages on account of said nervous condition for the reason that the court gave at the request of appellant the following instruction:

> "You are further instructed that you cannot allow to the plaintiff any damages for any claimed permanent injury to his nerveous systme."

Theproof shows that the first joint of the first finger of appellee's left hand became more or less deformed on account of the shock and burn and while this injury was slight yet it undoubtedly was a permanent injury and appellee was entitled to recover some damages therefor.

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The sixth instruction given on behalf or appellee is also criticized and is as follows:

> "If, from the evidence in the case and the instructions of the court, the jury shall find the issues for the plaintiff and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury themselves must make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the ordinary affairs of life."

Under a different state of facts this istruction would be unobjectionable. Richardson vs. Nelson, 221 Ill. 254. Under the pleadings and proofs in this case however it was erroneous and should not have been given. The declaration charges that appellee had incurred expense in and about attempting to be cured to the amount of $400. There was no evidence of any expense incurred by appellee but there is evidenc that he was treated for his injuries by several physicians. Medical services are capable of definate proof and if recovery is sought therefor such proof must be made, and the jury have no right to assess damages therefor from their own knowledge, observation and experience in the affairs of life. Barto vs Southwick, 185 Ill. App. 24., and cases cited therein. The injuries in this case are slight and, except for the injury to the finger hereinabove mentioned and the pain and suffering, consisted chiefly of several small scars left on the body of appellee which when he is clothed are not visible. From the large amount of the verdict it is probable the jury included in the assessment of damages a considerable sum for the expense incurred for medical services but we are of the opinion that in the present case this error may be cured by a remittitur.

The only evidence appellant offered on the trial of the case was a provision of an ordinance of the city of Clinton, which is as follows:

> "No person shall go upon, into, pass through, or over any property, or premises used for school purposes, within said city, under a penalty of not less than three dollars nor more than fifty dollars; PROVIDED, that this section shall not be so construed as to apply to children while atending school, teechers, janitors and such other persons as may go upon such property or premises for the transaction of any lawful business."

This the court refused to admit in evidence and it is urged this action was error. The object of offering this ordinance was to show that appellee was injured while committing a misdemeanor by trespass upon the

school property. This ordinance was not applicable to the facts in this case. Moreover, a child of the age appellee, could not be guilty of any crime or misdemeanor. Sec. 283, Chap. 38, Hurds, R. S.

We have considered the other errors assigned but do not deem them of sufficient importance to cause a reversal of the judgment. Under the facts, appellee was clearly entitled to recover but the damages are also clearly excessive for the injury received. The judgement will be affirmed for the sum of $850 if appellee will within 10 days remit $400 of the original judgment, otherwise it will be reversed and cause remanded.

April

Gen. No. 6556. ~~October~~ Term, A. D. 1916. Ag. No. 5.

Edward F. Trego, Trustee Etc., Appellee,

vs.

Estate of James A. Cunningham, Deceased, Appellant

Appeal from the Circuit Court of Vermilion County

205 I.A. 25

Graves, J.

This suit originated in the county court of Vermilion County, sitting as a court of probate, where claims were filed against the appellant estate for the use of William Moore and the Estate of A. H. Trego for contribution to approximately $300,000 claimed to have been paid by said Moore and Trego in liquidation of 80 promissory notes of the Hoopeston Horsenail Company of Hoopeston, Illinois on which the said William Moore, A. H. Trego, and James A. Cunningham together with C. S. Crary, John L. Hamilton and W. W. Todd, were indorsers. It was tried in the Circuit Court on appeal. That court held that the estate of Cunningham should contribute $47,626.46, the same being one-sixth of the total amount of $285,758.76 which it was there found had been paid by Moore and Trego on these obligations, and judgment was entered accordingly. That judgment was affirmed by the appellate court, but the Supreme Court reversed both the appellate and the circuit court and remanded the cause to the Circuit Court for further procedings. See **Trego v. Estate of Cunningham** 267 Ill. 367, and 188 Ill. App. 70. The Supreme Court held among other things in substance that if the Hoppeston Horsenail Company, the maker of the notes, and John L. Hamilton, C. S. Crary and W. W. Tood, the three

indorsers of such notes besides Moore, Trego and Cunningham, were insolvent, then the estate of Cunningham was bound in law to contribute to Moore and Trego, one-third of all the money they had in the end furnished to pay such of these obligations as he was originally jointly with them liable for, and was entitled to contribution from them to the extent of one-third each for any of such obligations he had furnished the money to pay.

On the first trial the Circuit Court rejected the claim of the trustee for contribution based on the contention that Moore and Trego had paid six notes amount-to $27,500 which were given after the death of Cunningham by the Horsenail Company as maker and indorsed by all of the indorsers of the original notes except Cunningham, on the theory that the giving of the new notes by the Horsenail Company was a payment of the original notes and a release of Cunningham. It reject-

ed the claim for contribution to the sum of $40,500 represented by ten notes because the bookkeeper said he was not certain who paid them. It is also rejected contribution to the amount paid on a $2500 note called the Peotone note. This note executed in blank by the company and with the names of the original six indorsers on it was left with W. W. Todd as the agent of the maker and indorsers to be used by him as occasion required. It was issued on the day of the death of Cunningham. The theory of the Circuit Court was that the death of Cunningham revoked as to him the agency of Todd to issue it.

As to the claims based on the payment of the six notes aggre

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gating $27,500 the effect of the holding of the Supreme Court was that Cunningham should contribute one-third of the amount paid by Moore and Trego on those notes.

As to the ten notes aggregating $40,500 the Supreme Court held in substance that the burden of proving that those notes had been paid by Moore and Trego was upon the claimant and as that fact had not been established by a preponderance of the evidence the claim as to those notes was properly excluded.

As to the $2500 Peotone note, the Supreme Court held that the primary authority of W. W. Todd to issue the note being established, it must be presumed to continue until the contrary was made to appear by proof, and that the burden was on the estate of Cunningham to show that Cunningham was dead when the note was issued, and that on the state of the record then before that Court the part of the claim based on that note was improperly excluded.

The case has since been retried by the Circuit Court and that Court has found that the Hoopeston Horsenail Co., John L. Hamilton, C. S. Crary and W. W. Todd are all insolvent; that the ten notes aggregating $40,500 above referred to were all paid by Moore and Trego and that the Pectone note was negotiated and delivered before the death of Cunningham, and has added the amounts of these notes together with the amount paid on the six notes aggregating $27,500 which the Supreme Court held should have been allowed on the former trial to the amount allowed claimants on the other notes, and has entered judgment against the Cunningham estate for $113,490.67 the same being one-third of the

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total amount which the Court found Moore and Trego had paid on these notes, with accrued interest added. From this judgment the Cunningham estate has appealed.

It is urged by appellant that claimants can only have judgment for contribution to such moneys as they had actually paid at the time the claims were filed; and that all claims for contribution to funds not paid are contingent.

As we understand the evidence, every note on which Cunningham was originally liable with Moore and Trego and to the payment of which the estate of Cunningham has been adjudged to contribute, was paid by Moore and Trego before the claims in question were filed, either in cash or by new notes on which the name of Cunningham does not appear and on which Moore and Trego were the only responsible signers. The giving of such new notes in lieu of the notes on which the name of Cunningham appeared, was as much a payment of the joint obligation of Cunningham, Moore and Trego, as if the same had been paid in cash, for the estate of Cunningham was discharged from liability on such old notes. The Supreme Court said with reference to this situation when this case was before them on the former appeal, "The estate of Cunningham was discharged, but that fact does not determine the question of a right to contribution." It must also be remembered that the Supreme Court has held in this case in effect that the liability of Moore, Trego, Cunningham, Hamilton, Todd and Crary was as between themselves at least that of joint obligors and that the rules governing ordinary indorsers do not apply. The claims having been

filed within one year after letters of administration in the Cunningham estate were issued, and being for contribution to payments made on joint obligation, are not subject to the objections that they were prematurely filed, that they are contingent claims or that they are payable only out of subsequently discovered assets of the estate. Besides all that, this suit was begun by filing claims in the probate court against the estate, no written pleadings were necessary, in order to present this question. **Bromwell v. Estate** 139 Ill. 424, **Marshall v. Coleman** 187 Ill. 556. It was the duty of the executors of the estate to make that defense at the first trial and in all the courts through which the case passed **Bromwell v. Estate Supra,** and it must be presumed on this trial that they did their duty in that respect. The holding of the

Supreme Court that part of these claims, that are now objected to as being prematurely filed, should be allowed and that others could be allowed if certain facts not involving the time of their presentation were shown, was a holding that they were duly and timely filed, and is **res judicata** now. Even if the question was not expressly raised in the Supreme Court, there can be no question that it might and should have been, and the result is the same for the doctrine of **res-judicta** embraces not only what has been actually determined in the former suit, but extends to any other matter which might have been raised and determined in it.

Harvey v. Aurora & Geneva Ry. Co. 186 Ill. 283; **South Park Commissioners v. Ward & Co.** 248 Ill. 299; **Lingle v. Chicago,** 221 Ill. 519; **Bradley v. Lightcap** 201 Ill. 511; **Godschalck v. Weber,** 247 Ill. 269; **Ward v. Field Museum** 241 Ill. 496,

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Objection is made to so much of these claims as is based on a certain note called "Exhibit 3" for the reason that it was not by its terms made due at a time certain, and it is not negotiable, and therefore Cunningham could not be held liable on it as an indorsre of a negotiable instrument. A sufficient answer to that objection is that the Supreme Court in effect holds the liability of Cunningham to be that of an original joint obligor and not as an indorser under the rules governing the liability or ordinary indorsers.

It is next insisted that the finding of the Court that the Peotone note was issued before the death of Cunningham and that the ten notes aggregating $40,500 were paid by Moore and Trego, are not supported by the evidence. We have examined all the proof offered on these issues carefully and are not prepared to say that the findings of the Court are not supported by the weight of all the competent evidence.

There is evidence tending to show that Moore has never paid $600 of his original subscription to the capital stock of the Hoopeston Horsenail Co; that Trego still owes $1700 of his original subscription to such stock, that Moore and Trego have since the death of Cunningham each borrowed of the Horsenail Company $11,460 for which that Company holds their negotiable promissory notes, and that those items should all be deducted from the gross amount paid by those gentlemen on the debts of that company and that contribution should be asked only as to the balance. If Moore and Trego were suing the corporation to recover a judgment against it for moneys paid by them in the liquida-

tion of the company's debts the items mentioned would undoubtedly be set off and judgment rendered only for the balance. These items are all assets of the corporation and each stockholder in, and creditor of, the corporation are interested in these items. The Cunningham estate is only interested in them to the extent of the proportion of the shares it owns in the corporation. Neither the corporation nor any of its officers or stockholders or creditors, except Moore, Trego and the Cunningham estate are parties to this suit and the court is powerless to adjudicate either the legal or equitable rights of the persons interested in those funds who are not parties to this suit. These items were properly excluded from the consideration of the court in adjudicating the rights of the parties to this suit.

Some reference has been made by counsel to other questions but they are we think without exception matters which the Supreme Court have already considered and settled in this case adversely to the contentions of appellant.

No reversible errors have been pointed out in this record. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

2775

Gen. No. 6598. October Term A. D. 1916. Ag. No. 83.

Polly Dunham, Plaintiff in Error,

vs.

Estate of Abraham Stephens, deceased, Defendant in Error.

Error to the Circuit Court of McLean County

205 I.A. 27

Graves, J.

Plaintiff in error filed her petition in the County Court of McLean County to establish her right as a half-sister and heir at law of one Abraham Stephens, deceased, to one quarter of a fund saved to the estate from the amount devised to Mary Ella Chapman and Anna D. O'Harra by the said Abraham Stephens, deceased, by settlement and compromise of a certain suit brought by Addie Wooster, Fannie Westover and Abraham Squires, a minor by next friend, to contest the said will. The petition later came before the Circuit Court of McLean County on appeal from the County Court. In the Circuit Court a demurrer to the petition was sustained and the petition was dismissed. That order was reversed by this court and the cause was remanded to the Circuit Court with directions to overrule the demurrer. See **Dunham v. Stephens** 190 Ill. App. 554. The question involved in the ruling on the demurrer was, as expressed in the opinion of this court, "Whether or not the difference in the amount that Mrs. Chapman and Mrs. O'Harra would have received under the will and the amount for which they sold and assigned their legacies became intestate property and descended to the heirs at law of Abraham Stephens."

After the case was redocketed in the Circuit Court that court overruled the demurrer, as directed by this court. The defendants

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answered the petition and the cause was heard by the court on the issues so made. The finding was for the defendants, and a decree was entered dismissing the petition "for want of sufficient proof upon the hearing to sustain it." Counsel for defendant in error in explanation of the reasons given in the decree for dismissing the petition say:—

> "It is very clear from the order itself, that the sole ground upon which he dismissed the petition was that it had not been proved; that it could not be proved because the Stephens Estate was not then settled and could not be settled for some time; hence, that there could be no proof that the Sixty-one thousand eight hundred dollars paid for the compounding and assignment of the Chapman and O'Harra specific legacies and their interest in the residuary bequest was less than the amount they

would have received for their specific legacies and under the residuary clause of the testator's will. Hence there was no subject matter nothing to which a decree could attach and operate upon."

This court when this case was here before, held that under the facts alleged in the petition, the money paid Mrs. Chapman and Mrs. O'Harra in the settlement of the will contest was paid from the funds of the estate of Abraham Stephens; that the sum so paid to them was less than they were to receive by the terms of the will; that the sum saved belonged to the estate and was intestate property and should descend to the heirs at law of Abraham Stephens.

The holdings of this court on facts admitted by a demurrer are conclusive on the Circuit Court on a trial of the same case on the merits, if the same facts are established by the evidence, and are also conclusive on this court on a review of the record of such trial. **Chicago & A. R. R. Co. v. Kelly** 182 Ill. 267, **Bank of Chicago v. Post** 93 Ill. App. 339, **Lennartz v. Popp** 175 Ill. App. 539, **Wilson v. Carlinville Natl. Bk.** 87 Ill. App. 364, **Westbrook v. Fredrickson** 97 Ill. App. 40, **Northern Pac. Exp. Co. v. Traders Ins. Co.** 83 Ill. App. 513, **Geiman v. Town of Browning** 87 Ill. App. 418, **Chicago & A. R. R. Co. v. Gore** 105 Ill. App. 16.

Such holdings are binding on this court notwithstanding there has been a change in the personnel of the court **Garret v. Pierce** 84 Ill. App. 31.

However desirable a different practice might at times seem to be the only way this court can sit in review of its own holdings is on a petition for a rehearing filed in the proper time. The argument of counsel for defendant in error as to what this court should or should not have held or done on a former appeal is entirely beside the question on this hearing. The important questions to be considered now are what did this court then hold, based on the material facts averred in the bill and admitted to be true by the demurrer, and are those same material facts shown to be true by this record, either by admission in the answer to the petition or by the proofs introduced in evidence? If they are, we are bound by the former opinion, and will not undertake to reform or review it.

It is averred in the petition and admitted by the answer to be true that a settlement of a will contest was made wherein Mrs. Chapman and Mrs. O'Harra were paid less for their shares than they would have received by the terms of the will; that the testator left four sets of heirs, each set entitled to inherit one-fourht of

any intestate property left by Abraham Stephens and sets of heirs, each set entitled to inherit one-fourth of any and all intestate property of the testator Abraham Stephens; that all legacies mentioned in the will of Abraham Stephens have been paid except a part of the residuary legacies of Mrs. Chapman and Mrs. O'Harra; that all the debts of the testator have been paid and that the money paid Mrs. Chapman and Mrs. O'Harra was the money of the estate.

The proof conclusively shows that all the material averments of the petition were proven, except the amount in value of the property

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claimed to be intestate; that the legacies, debts and costs of administration have been paid except that part of the legacies of Mrs. Chapman and Mrs. O'Harra over anr above the sum of $61,-800 which amount was paid in full settlement and satisfaction of their legacies and also excepting certain attorneys fees; that the $61,800 so paid to Mrs. Chapman and Mrs. O'Harra was paid by the administrators out of the funds of the estate; that at the date of their last report the administrators had on hand $50,000 to be distributed; that in making distribution beyond the payment of specific legacies the administrators have divided such funds into three parts and have ignored plaintiff in error in such distribution; that the legacies of Mrs. Chapman and Mrs. O'Harra under the terms of the will amounted to $167, 056.70; that in lieu of that amount they were paid pursuant to the terms of the settlement of the will contest, $61,800 and $2,315.32 interest, or a total of $64, 115. 32 or $102,941.38 less than they would have received had no compromise of their legacies been made.

Under the holdings of this court when this case was first here the $102,941. 38 that was saved by the settlement of the will contest was and is intestate property which must descend to the heirs at law of Abraham Stephens, one-quarter of which, less any lawful deductions for attorneys fees and administrators commissions, if any such there are still unpaid, belongs to plaintiff in error.

While defendant in error claims there are items unliquidated of attorneys fees and administrators commissions, it is nowhere contended that such sums amount to more than a small percent of such intestate property, so that if all such expenses are allowed and paid out of this

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fund, there will still be approximately $100,000 of intestate property to be distributed to the heirs.

From what is said by counsel for defendant in error in the extract from their argument heretofore referred to it seems that one of the reasons, if not the only one, why the Circuit Court dismissed the petition was that the estate was not then settled and for that reason there could be no proof that $61, 800 was less than Mrs. Chapman and Mrs. O'Harra would have received if the funds of the estate had been distributed under the terms of the will and that therefore there was nothing shown by the evidence upon which a decree for distribution could operate. The proof is ample that there is in the neighborhood of $100,000 over and above all claimed attorneys fees and administrators commissions on which such a decree could operate. All that plaintiff in error claims as her share of that sum is $25,735.37 less one-sixth of the amount of attorneys fees and administrators commissions still unpaid.

The Circuit Court erred in dismissing the petition and that decree is reversed and the cause is remanded to the Circuit Court with directions to that court to enter a decree finding that there was saved by the settlement of the will contest, from the Chapman and O'Harra legacies $102,941.38 and that the amount so saved was intestate funds, and directing defendants in error to make a report showing the redeipt of said funds and also showing any expenditures made or liabilities incurred are properly chargeable to that fund and upon such report being presented and approved, to enter a decree directing the distribution of said fund less any money expended or liabilities incurred that

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can be properly deducted therefrom, among the four branches or groups of the heirs of Abraham Stephens, giving to plaintiff in error one-quarter thereof and giving to each of the three groups of his said heirs one quarter thereof.

Reversed and remanded with directions.

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2779

Gen. No. 6600. October Term A. D. 1916. Ag. No. 13.

Stacey VanValkenburg, Appellee,

vs.

The Granite Live Stock Insurance Company, a corporation, Appellant.

Appeal from the Circuit Court of Vermilion County.

205 I.A. 2

Graves, J.

This is an appeal from a judgment against appellant in a suit on a live stock insurance policy. The animal insured was a mare, the property of appellee; the policy contained the following provisions:—

> "There shall be no liability on the part of the company for loss * * * * * * if the assured, in case of sickness or accident to the animal or animals hereby insured, shall fail to render, at once, notice to the Secretary of the Company of such sickness or accident, together with the name and address of veterinary employed."

The proof conclusively shows that the mare was found to be sick on Friday the second day of July 1915; that at that time she was in training at the fair grounds of Urbana, Illinois, which is 31 miles from Danville, the home of appellee; that she was there in charge of one Tobias, the agent of appellee; that the trainer took her temperature and gave her quinine; that he continued this treatment until on Monday or Tuesday following, when he called Dr. Braithewaite, a veterinary, by telephone; that Dr. Braithewaite did not go to see the mare but prescribed for her; that Tobias treated her according to the directions received from this veterinary until Thursday, July 8th; that on that day appellee, who had returned home from Ohio on Tuesday, July 6th, and had been informed of the mare's sickness , brought Dr. Greer, a veterinary from Danville to see her; that when Dr. Greer arrived at Urbana about

seven o'clock A. M. of July 8th the mare was hopelessly sick with pneumonia; that at 9:35 p. m. of July 8th appellee sent to appellant at Bloomington, Illinois, a telegram or night letter that was delivered on July 9th at 7:40 o'clock A. M., notifying appellant that the mare was sick. This telegram was the first and only notice of any kind sent to appellant by appellee or his agents, of the sickness of the mare. The mare died at 5 o'clock P. M. of July 9th, the same day on which the telegram was received at Bloomington.

The provision in the policy heretofore quoted was a reasonable material and enforcible part of the contract of insurance and under it appellee was bound to give to appellant "at once" upon the sickness of the animal be-

ing discovered, notice of that fact. The penalty for a failure to do so being a want of liability on the part of appellant under the policy, if death should result from such sickness. **Talbott & Shoot vs. Atlantic Horse Ins. Co.** 193 Ill. App. 587.

The term "at once" as used in the passage quoted needs no construction. It means what the average person would understand it to mean, namely; promptly, as soon as could reasonably be done. It certainly does not mean that the insured may wait a full week before giving the notice required.

The fact that appellee when he filed his proofs of death of this animal stated that "the animal first showed signs of sickness" on July 6th, when the proof is conclusive that it showed signs of sickness on July 2nd, and continued to grow steadily worse until its death, is

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strongly suggestive of the fact that he appreciated that the notice of sickness had not been promptly given.

Neither does the fact that appellee was away from home when the animal was taken sick excuse the performance of the stipulation in question. He bound himself to give notice of sickness "at once" and if he was not so situated, for any reason, so that he could personally perform his contract in that respect, it was his imperative duty to arrange with others to perform it for him.

The judgment of the Circuit Court is reversed with a finding of fact to be incorporated in the record of this court that appellee did not give to appellant notice of the sickness of the insured animal within time required of him by his contract.

Reversed with finding of fact.

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Gen. No. 6601. October Term A. D. 1916. Ag. No. 14.

Stacey Van Valkenburg, Appellee,

vs.

Western Live Stock Insurance Company, a corporation, Appellant

Appeal From the Circuit Court of Vermilion County

205 I.A. 30

Graves, J.

This is an appeal from a judgment against appellant in a suit on an insurance policy on the same animal whose death gave rise to the case of **Van Valkenburg vs. The Granite Live Stock Ins. Co.** the opinion in which is filed simultaneously with this one.

The policies sued on in the two cases are much alike The clause in regard to notice in case of sickness is even more exacting against appellee in this case than in the other. It is as follows:—

> "In case of any sickness or injury to any of the animals herein insured, the assured shall at once give notice thereof by telegraph to the Company at its home office, Jefferson Building, Peoria, Illinois, and the perils indemnified against by this policy shall not include any loss where the assured has failed to give such notice."

The notices of sickness in the two cases are identical except as to the name and address of the insurance company and the number of the policy. The evidence as to the sickness and death of the animal in the two cases do not differ in any material matter. For the reasons given in the opinion filed in the Granite Live Stock Co. case, the judgment of the Circuit Court in this case is reversed with a finding of fact to be incorporated in the record of this court, that appellee did not give to appellant notice of the sickness of the insured animal within the time required of him by his contract.

Reversed with a finding of fact.

2801

Gen. No. 6604. October Term A. D. 1916. Ag. No. 17.

The People of the State of Illinois for the use of the State Board of Health of the State of Illinois, Plaintiff and appellant.

vs.

James E. Kane, Defendant and appellee.

Appeal from the County Court of Macon County

205 I.A. 32

Graves, J.

This is a suit in debt begun in the name of the People of the State of Illinois for the use of the State Board of Health to recover from appellee the fines and penalties provided by law for practising medicine without having a license from the State Board of Health so to do. The jury found the issues for the defendant and the court overruled a motion for a new trial and entered judgment on the verdict. The State appeals.

It is unlawful under the provisions of section 2 of chapter 91 of the statutes of Illinois for any person to practice medicine in any of its branches without a license so to do from the State Board of Health.

Section 9 of chapter 91 R. S. provides than any person practising medicine or treating human ailments without a certificate issued by the State Board of Health shall forfeit and pay to the People of the State for the use of the State Board of Health $100 for the first offense and $200 for each subsequent offense, to be recovered in an action of debt.

The right of the State Board of Health to sue for and recover the penalties provided for by the foregoing section has been upheld by the Supreme Court in **The People v. Dunn** 255 Ill. 289.

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Section 7 of chapter 91 R. S. is as follows:—

"Any person shall be regarded as practising medicine within the meaning of this act, who shall treat or profess to treat, operate on or prescribe for any physical ailment, or any physical injury or deformity of another; Provided, that nothing in this section shall be construed to apply to the administration of domestic or family remedies in cases of emergency, or to the laws regulating the practice of dentistry or of pharmacy. And this act shall not apply to surgeons of the United States Army, Navy or Marine Hospital Service in the discharge of their official duties or to any person who ministers to or treats the sick or suffering by mental or spiritual means without the use of any drug or material remedy."

This section of the statute was construed by the Supreme Court in the**People v. Dunn Supra.** In the People etc. v. Brown (General No. 6562 not yet reported) this court reviewed all the cases in this state touching the questions here involved. From a review of all these cases there can be no doubt that one who advertises, professes, offers, undertakes or pretends to undertake to

diagnose, treat, heal or benefit a patient, regardless of whether that patient is or is not suffering from any actual ailment or disease and who charges or accepts compensation therefor is practicing medicine within the meaning of the statute under which this suit was brought, and is subject to the penalties therein provided.

The evidence in this record clearly shows that appellee undertook or pretended to diagnose, treat and cure the trouble of his patients. True the diagnoses in all cases were remarkably alike. The formula was, "the bones or vertebra of your back are out of their normal or proper position etc." and he advertised and assumed or pretended to be able to "place those bones of the back in their normal or proper position," the result of so doing to be health. This adjustment he did or pretended to do by apply pressure with his hands to the vertebra and manipulating the same, first having, as one witness expressed it, removed all clothing

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"down to the real man, down to the hips." He gave to some of his customers a sort of pamphlet on the inside of the first cover of which were six verses of doggerel worse out of joint than the backs of his customers, the purpose of which seems to be to call attention to the wide class of ailments that chiropratic treatments would cure.

The record further shows that what appellee advertised, attempted or pretended to do did not come within the proviso of the section quoted. It is also further disclosed that he did what he did for pay and that he was in fact paid for it.

There can be no question that the evidence in this record clearly shows that appellee was practising medicine within the meaning of the statute above referred to, and there is no pretense that he had a license or certificate from the State Board of Health permitting him to do so.

The verdict was manifestly contrary to the weight of all the evidence and the judgment is reversed and the cause remanded to the County Court.

Reversed and Remanded.

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2802

Gen. No. 6607. October Term A. D. 1916. Ag. No. 20.

Abraham B. Steinhour, Appellant,

vs.

Dora Merrilees, Et Al, Appellees.

Appeal From the Circuit Court of Logan County.

205 I.A. 3

Graves, J.

On July 15th, 1915 appellant entered into a contract with appellees for the purchase of some real estate whereby it was agreed among other things that appellees should convey to appellant the said real esatte by warranty deed, and should furnish to appellant an abstract of title to the premises in question, showing the same to be free and clear of all clouds and incumbrances, and if the title to the same was not good but could be made, that appellees should make it so by March 1, 1916, and appellant should reserve $500 from the purchase price until it was made good, and if the title was not made good by July 1, 1916, appellant might clear the same and pay the expense of so doing out of the $500 of the purchase price so reserved; that appellant should pay appellees $1200 of the consideration for the lands, cash down, and in the case the title could not be perfected legally, appellees should return the $1200 advanced. Appelant advanced the $1200 and appellees prepared and tendered deeds to the premises which appellant refused to accept, claiming that good title was not conveyed thereby and that appellees could not give good title. Appellees refused to return the $1200 advanced and appellant brought this suit to recover the same. The court before whom the case was tried found the issues for

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the defendants and rendered judgment against the plaintiff in bar of his action and for costs. The plaintiff has appealed.

The title of appellees was derived through the will of one William Hargadine, deceased, by the terms of which the premises in question was given to appellee Dorothea Merrilees, a daughter of the testator, for life, and at her death to descend to and become the property of the heirs of her body begotten in lawful wedlock, or the survivors thereof, share and share alike, they to have possession thereof as they shall thereafter become of age. By a later provision of the will it is provided that in case of the death of any of his daughters leaving no heirs of her body begotten in lawful wedlock, then the share of such daughter shall descend to and be distributed among his surviving daughters.

These bequests were subject to certain other re-

strictions and conditions not involved in this litigation.

Upon his death the testator left as his only children and heirs at law three daughters, Dorothea Merrilees, Mary A. Coffman and Martha J. Ogle.

Dorothea Merrilees at the time this litigation arose had four children living, Lydia Coombs, Margaret Louks, Mason Appelgate and Willard Merrilees. All of them were of age, Dorothea Merrilees then being past sixty-three years of age.

Appellees tendered to appellant deeds signed by all the children and grand-children of the testator, and by their consorts where such persons were married, in which deeds appellant was named as grantee.

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These deeds were refused for the specific reason as expressed by appellant in his brief and argument "that the title which defendants derived from William Hargadine under his will was uncurable until the death of Dora (Dorothea) Merrilees." By that expression we understand counsel to mean that until the death of Dorothea Merrilees it cannot be determined who will be the owners of the fee in the premises in question after the termination of the life estate.

There can be no doubt under the holdings of the Supreme Court of this state that by the will of William Hargadine estates in reversion and contingent remainders were created based on the life estate given to Dorothea Merriless. **Blakey vs. Mansfield** 274 Ill. 133, **Bond v. Moore** 235 Ill. 576. **Smith v. Chester** 272 Ill. 428.

In the cases cited it is held that when the members of the class who are by the terms of the will, to take the remainder at the death of the life tenant, cannot be ascertained until that event takes place, and the life tenant and the owners of the reversion convey their interests to the same person, the life estate and the reversion merge in the same person and the contingent remainder is defeated by destroying the life estate on which it is based.

The deeds, tendered, being signed by the owners of the life estate and of the estate of reversion, would have vested in appellant, the grantee therein named, the title in fee to the premises therein described, if the same had been accepted.

Some evidence was heard by the court upon the trial and some

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contention was there made by appellee that a modification of the original contract was made in a conversation between the parties, whereby it was agreed

that the deeds tendered should be accepted as conveying good title. Permitting such evidence to be introduced is urged for error. Granting that it was error it was harmless for the reason that the deeds tendered were sufficient to convey the title called for by the written contract sued on.

Several other supposed defects in the title claimed to be shown by the abstracts in evidence has been argued here. These objections were not presented to or passed upon by the Circuit Court and therefore are not of any avail here. The only defect in title contended for in the Circuit Court was the one specified in the bill of particulars, i. e. "The plaintiff by advice of counsel rejected the title as not filling the contract; **on the ground that it is impossible during the life of Dora Merrilees to clear the title by any suit."** That objection has already been disposed of. Besides that, no other objection to the title has been suggested that could not in all probability be cured by a bill to quiet title, and as to such defects the contract sued on provides;

"If said title is not good but can be made good according to this contract first parties agree so to do and if the same is not done by March 1, 1916, second party shall reserve $500.00 to be kept in said bank until same is complied with; if title is not perfected by July 1, 1916, said second party may clear same at expense of the first parties to be paid out of said $500.00. Second party to get possession March 1, 1916."

It is further argued that appellees have made other conveyances of this property. The record shows that one of the parties to the contract, Marion Louks, has obtained title to the other interests and has given a mortgage on the premises for $9000, but that was after appellant

had positively refused to accept the title tendered, and besides that at the trial in the Circuit Court on February 9, 1916, Louks offered, and testified that he was ready able and willing to clear the title to the lands and convey the same to appellant according to the terms of the contract, if appellant would accept and pay for the same by March 1, 1916, as provided by the contract, but the offer was not accepted. It will be observed that at the time Louks made this offer the time provided for the fulfillment of the original contract had not expired by nearly three weeks.

There was no error in the findings of law. All correct propositions of law contained in those refused were also contained in those held.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

2803

Gen. No. 6610. October Term A. D. 1916. Ag. No. 23.

O. P. Simpson, Administrator of the Estate of William Simpson, Deceased, Appellant,

vs.

Artamisa Roberts and J. O. Roberts, Conservator of Artamisa Roberts, Feeble-Minded, Appellee.

Appeal from the Circuit Court of Shelby County.

205 I.A. 35

Graves, J.

William Simpson, deceased, was for a time before his death the conservator of the person and estate of Artamisa Roberts, a feeble-minded person. After his death his administrator began this suit to recover from appellees for moneys claimed to have been expended and services claimed to have been rendered by him for the said Artamisa Roberts during the time he was her conservator, over and above the amount received by him from all sources for her use. The declaration consists of the common counts and what purports to be a special count. There was filed as an amended bill of particulars a series of totals of amounts received and amounts paid out and balances claimed to be due appellant, which balances were struck at irregular intervals covering a period of time beginning April 9th, 1896 and ending December 30, 1912. There is no information hazarded in this so-called bill of particulars as to the source of separate items of the income or the items of expenditure, or the persons who received the same. The court before whom the cause was tried found the issues for the defendant and entered judgment against the

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plaintiff in bar of his action and for costs.

To maintain his suit appellant introduced in evidence reports which had been filed by or for his decedent in the County Court, of his acts and doings as such conservator from April 27, 1896 to December 30,1912. Appellee objected to these reports as evidence on several grounds, but the same were received subject to such objections. No other proof of his claim was offered by appellant.

There are several reasons why these reports were not competent evidence.

They are nothing more than **ex-parte** statements of the matters therein contained and do not constitute even **prima facie** evidence of such facts until there is proof of an adjudication of their correctness by the court in which the same were filed. The proof of such adjudication can only be made by introducing the record of

the same in evidence, and this was not done. There is a memorandum on some, if not all, of these reports to the effect that they have been approved by the "County Judge" but no record of their approval was produced, if any is in existence.

Some of these reports were made by one styling himself attorney in fact for William Simpson, the conservator. We know of no law which authorizes a conservator to act by an attorney in fact.

Some of the items in these reports are cleahly for things that are not necessities of the Ward. To illustrate —the funeral expenses of the mother of the ward are not primarily a necessity nor a proper

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charge against the ward. It may well be that upon a proper showing the ward could be charged with that expense but no such showing was made.

The charges in some of these reports were not itemized or any showing made of what the same was expended for.

There is an item in one of these reports in which the ward is charged with $367.22 "by error in report of May 16." What the error was or what "May 16th" is referred to is not made to appear either in the report or by any other means.

The reports offered in themselves do not amount to any evidence of the claim sued on. There was no proposition of law passed upon or presented and no complaint is made by appellant of the rulings of the court on the admission of evidence. The sole question presented on this appeal is whether under the evidence appellant was entitled to a judgment.

As the reports referred to were not, without other evidence, any proof whatever of the debt sued for, and as no other proof was offered, it follows that there was nothing upon which the Circuit Court could have rendered judgment for appellant.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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2807

Gen. No. 6613. October Term, A. D. 1916. Ag. No. 26.

Ollie Sampson, Plaintiff in Error,

vs.

Retta L. Harshman and Clement E. Harshman, Defendants in Error.

Writ of Error to the Circuit Court of Moultrie County

Graves, J.

205 I.A. 37

This writ of error was sued out by plaintiff to have reviewed a judgment in his favor for $25 in a suit for personal injuries. The sole complaints that are available to plaintiff in error in this case are such as relate to the inadequacy of the verdict. Other questions have been argued but the finding of the jury was in favor of plaintiff in error on the question of liability, and any errors pertaining to that question that may be found in the record are harmless as far as plaintiff in error is concerned.

Plaintiff in error was a farm laborer working for his father under a contract by which he was to receive for his services $27 per month and his board and washing until the last of June, and harvest wages through harvest.

A wagon in which plaintiff in error was riding was upset by a runaway team belonging to one of defendants in error, and he sustained a sprained ankle. He testified that he walked on crutches over seven weeks and that he "did not work" any after the accident until September. The accident occured April 13 of the same year. He also testified that he could not wear a shoe for five months. There is, however, no proof shown in the abstract, neither can we find any in the record

that he did not in fact receive his $27 per month and his board and washing for the whole time he was laid up. Neither is there any evidence that his failure to work at that time was due to the accident. Neither is there any proof that he expended any money for medical services, medicine or anything else in and about being healed. The amount of damages that he was entitled to receive was therefore a matter of estimate, not of definite proof. Under those circumstances the amount of the damages that should be awarded was peculiarly within the province of the jury to detrmine.

Plaintiff in error in his argument says that the matter of damages were susceptible of definite proof. The fact that it may have been susceptible of definite proof does not supply the proof. It is the proof that is lacking here, not the opportunity to make it.

The judgment is affirmed.

Judgment affirmed.

2805

Gen. No. 6621. October Term A. D. 1916. Ag. No. 32.

A. R. Rich, Administrator of the Estate of Rizpah Hudson Rich, Defendant in Error,

vs.

Blueford Wilson and William Cotter, Receivers of the Chicago, Peoria & St. Louis Railroad Company, Plaintiffs in Error.

Error to the Circuit Court of Jersey County.

205 I.A. 38

Graves, J.

In the trial of a suit in trespass on the case brought by an administrator to recover pecuniary damages for the benefit of the next of kin because of the death of a little girl four years old, caused by a collision between a train of plaintiff in error and an automobile in which the child was riding and which was being driven by the mother of the child, the court gave two instructions which informed the jury in substance that the law required of plaintiff in error to have a bell weighing at least thirty pounds ringing continously for the eighty rods immediately before the train reached a public highway crossing or to have a whistle sounding continuously on the engine pulling such train, for the eighty rods immediately before reaching such crossing.

These instructions were erroneous. The law requires that **either** a bell **or** a whistle be continuously sounded for eighty rods before reaching such a crossing. The servants of plaintiff in error had the option to sound the bell part of the time and the whistle part of the time **or** sound either the bell or the whistle all of the time but was not required to sound either one, all **of** the time. **St. Louis Etc. Ry. Co. v. Hawley** 90 Ill. App. 653.

An instruction was given on the question of damages in which the following language was used:— "You should fix such damages at such amount as the jury may believe from the preponderance of the evidence will justify and fairly compensate the next of kin."

Instructions in which equivalent language to that quoted has been used have been condemned in **Muren Coal and Ice Co. v. Howell** 204 Ill. 515 and cases there cited.

In **Waldron v. Marcier** 82 Ill. 550 the Supreme Court said of such an instruction "It should have been 'such damages as she had sustained' and not have given to the jury the wide latitude of allowing her such damages as they might deem that she was entitled to." See also **Fowler v. C. & E. I. R. R.** 234 Ill. 619, **I. C. R. R. Co. v. Johnson** 221 Ill. 49.

The jury assessed the plaintiff's damages at $5000. In view of the fact that there was no evidence in the record of whether the child was well and strong or sickly and weak, or whether it was bright or foolish, or whether its characteristics were such as would likely render it a burden or a benefit to the next of kin, the amount of the verdict is so large as to challenge the conscience of persons unaffected by personal interest. We cannot bring ourselves to the belief that the evidence warrants a finding that the next of kin had suffered pecuniary loss to the extent of $5000 by the death of this child. Neither are we able to deny that the erroneous instructions may have caused the jury to find the same.

A judgment for $5000 based on this verdict was rendered. This

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judgment must be and is reversed for the reasons given, and the cause is remanded to the Circuit Court for another trial.

Reversed and Remanded.

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Gen. No. 6624. October Term A. D., 1916 Ag. No. 35

Fred Baber, Trustee, Appellee,

vs.

Erastus Hurst, et al Appellant.

Appeal From the Circuit Court of Edgar County

205 I.A. 39

Graves, J.

This is a suit in chancery to restrain the collection of a certain judgment and to vacate the same. An issue of fact was formed and tried by a jury. The jury determined the issues in favor of the complainant and a decree was entered following the finding of the jury.

A motion of appellee to strike the bill of exceptions from the files was taken with the case. It is based upon the contention that it was not filed in the office of the clerk of the Circuit Court within the time allowed by that court for so doing.

It is contended on the part of appellant that there was no time fixed by the order of the court within which the bill of exceptions should be **filed with the clerk;** that the court did fix a time within which it should be presented **to the judge for signature;** that it was presented to the judge and signed by him within the time specified, and that the motion to strike it should therefore be denied.

The decree was entered on March 28, 1916. The record of the court of that date in this case as it appears in the transcript thereof filed in this court by appellant shows that the prayer of appellant for an appeal was allowed, "on the defendant filing an appeal bond

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in the sum of $200 within thirty days from this date, and the **filing** of a certificate of evidence within ninety days from this date."

There is in the certificate of evidence signed by the trial judge who purports to be an order for an appeal which purported order recites that the certificate of evidence shall be **"presented"** within ninety days.

Such a recital in the certificate of evidence is improper, out of place and inoperative. The sole function of a certificate of evidence in a chancery case is to truly set fourth the evidence offered, rejected, received and considered on the hearing and any attempt to make it subserve any other purpose, is without warrant of law. All written motions and the orders made thereon are matters to be entered of record by the clerk. As to such matters a court of review is bound by the clerk's

record so made. **Flaherty v. McCormick,** 123 Ill. 525; **Colehour v. Roby** 88 Ill. App. 478; **Ames v. Stockoff** 73 Ill. App. 427.

The certificate of evidence was presented to and signed by the trial judge on June 21, 1916. The time allowed by the court within which it could be filed expired on June 26th; five days after it was signed by the judge.

Instead of filing it within the time given it was held until August 19, 1916, almost sixty days after it was signed.

The delay in filing the certificate of evidence was not the fault of the court as it appeared to be in **Hill Co. v. U. S. Guaranty Co.** 250 Ill. 242, cited by appellant.

The motion of appellant to strike the certificate of evidence

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from the transcript of the record in this court is allowed and the same is stricken accordingly.

As the detremination of the only errors argued in this case depends upon facts which can be shown only by a certificate of evidence and as there is no such certificate now in this record the decree of the Circuit Court is affirmed.

Decree affirmed.

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2805

Gen. No. 6633. October Term A. D. 1916. Ag. No. 44.

John R. Myers, Appellee,

vs.

Modern Woodmen of America, Appellant

Appeal from the Circuit Court of Macon County

205 I.A. 45

Graves, J.

Appellant is a fraternal benefit society. Appellee is the only heir of one Henry M. Myers who prior and at the time of his death was a member of the society and held a benefit certificate for $3000.00 in which May M Myers, the wife of the member, was named as beneficiary. May M. Myers, the beneficiary named, died during the lifetime of the member. On February 23, 1915, the member made out and sent in to the head camp what is called for some unknown reason "a waiver of lost certificate," but which was in truth an offer to waive all rights under the original certificate in consideration of the issuance by the society of a new certificate making appellee a beneficiary to the extent of $1000; one Van R. Myers, a brother of the member a beneficiary to the extent of $1500 and one Jane Nicely, a sister of the member, a beneficiary to the extent of $500. This paper was received at the head office of the society at Rock Island, Illinois, on February 26, 1915. but no new certificate was ever issued pursuant to the request therein contained or otherwise. The member died on February 28, 1915. When this case was tried suits were pending in the state of Ohio brought by Van R. Myers and Jane Nicely respectively for the amounts they would have respectively received had a new certificate been issued in accordance with the application therefor made by the member in his life time. Appellee has already received $1000 from appellant. Judgment was entered in this suit in favor of appellee and against appellant for $2058. It is not denied that the judgment is correct if the original certificate was in force at the time the member died.

Appellant opens its argument with the statement that "The issues to be determined in this case are very similar to the case of Louis Killion vs. Modern Woodmen of America"———Ill. App.——— in which the opinion was filed by this court in October 1916. In that case we held

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original certificate was in force and the Supreme Court has since refused to issue a writ of certiorari in that case.

The member to whom the benefit certificate was issued in this case had the undoubted right during his

life time to change the beneficiaries named in his original certificate.

As to how a member shall proceed to make a change in his beneficiaries and when it shall be effective is pointed out by the by-laws of the society. These by-laws are by the application for member ship and the benefit certificate issued, made a part of the contract for indemnity It is there provided:—

Sec. 47. Change of Beneficiary—Assignment of Benefits—Any member in good standing who desires to change his beneficiary shall execute the surrender clause on the back of his benefit certificate, designating therein the change desired, and deliver said certificate, together with a fee of 50 cents, to the Camp Clerk * * * * The local clerk shall deposit one-half of said fee of 50 cents in the general fund of the camp and forward said certificate and the remaining half of said fee to the head Clerk, who shall thereupon issue a new benefit certificate payable to the beneficiary named in said surrender clause * * * * No change in the designation of beneficiary shall be effective until a new certificate has been issued by the Head Clerk and within the lifetime of the member. Any attempt by a member to change the payee of the benefits of his benefit certificate by will or other testamentary document, contract, agreement, assignment, or otherwise than by strict compliance with the provisions of this section shall be absolutely null and void * * *.

Sec. 48. Substitute for Lost Certificates—In case a benefit certificate is lost, destroyed, or beyond the member's control, he may, in writing, on form furnished by the Head Clerk, waive all claims thereunder, designate the same or some other beneficiary, the same or a smaller amount of benefits, and have a substitute certificate issued by filing the said waiver with and paying to his Camp Clerk a fee of 50 cents. Thereupon, the Camp Clerk shall forward to the Head Clerk said waiver and one-half of said fee, whereupon a substitute certificate shall be issued as requested. No change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member and until such time the provisions of the old certificate shall remain in force.

Sec. 49. Contract for Beneficial Membership—The contract for beneficial membership between the Society and its beneficial members shall include the application for beneficial membership, the medical examination furnished by the applicant, the benefit certificate issued thereupon, and the bylaws of the society as they exist at the time of the issuance of the certificate, or as they may be thereafter amended, modified or charged; all with the same force and effect as if written into the face of the benefit certificate. This provision shall be construed not only to govern the rights and conduct of the member, but also to determine the financial liability of the member to the society and of the society to the member and his beneficiary or beneficiaries.

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The language used in the by-laws quoted would seem to be too clear to need interpretation or construction. If anything could be said to make more clear the rights under the provisions of these by-laws, it was said in **Hodalski v. Hodalski** 181 Ill. 158.

The plain meaning of these by-laws as interpreted in the **Hodalski** case is that no attempted change in the beneficiary named in a benefit certificate will be effective until a new certificate has been issued during the

lifetime of the member in which a new beneficiary is named. **Freund v. Freund,** 218 Ill. 189.

We are aware that there are numerous cases in various jurisdictions holding that when the member has done all that he can do to change his beneficiaries it will be regarded as done. This equitable rule has no application in actions at law in this state where the distinction between law and equitable jurisdiction is preserved. **Killion vs. Modern Woodmen Supra.**

Beneficiaries named in the benefit certificate of a mutual benefit society have no vested rights therein, until the death of the member, but such rights attach immediately upon the death of the member. **Hodalski v. Hodalski, Supra. Benton v. Brotherhood of Ry Brakemen** 146 Ill. 570.

Appellee was at the time of the death of the member the beneficiary named in the original certificate sued on. No. change of beneficiary had been made and no new certificate naming any person as beneficiary had ever been issued. He was clearly entitled by the terms of the contracts between appellant and the deceased member to the

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full amount named in the benefit certificate.

In view of what has been said, there was no error in the rulings of the court in settling the pleadings in this case.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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2807

Gen. No. 6636. October Term A. D. 1916. Ag. No. 47.

Thomas A. McMahon, Appellant,

vs.

Selena Crone, Appellee.

Appeal from the Circuit Court of Greene County

205 I.A. 47

Graves, J.

This is a suit in assumpset on a promissory note amounting with interest to $266.88 and a loan of $41.

The defense interposed to the note was that it was signed in jest without consideration and that it was never delivered to appellant but was taken by him without the knowledge or consent of appellee.

As to the claimed loan of $41 the defense was that appellee had never borrowed that or any other amount of appellant. Appellee further set out in her affidavit of defense that she did not owe appellant anything whatever.

There was no plea or claim of set-off presented by appellee in this case. The jury found the issues for appellee and judgment was entered against appellant in bar of his action and for costs.

Appellant claims the verdict and judgment is contrary to the manifest weight of the evidence and that appellee was allowed to introduce incompetent evidence of a loan made by appellee to appellant of $310.

The evidence regarding both branches of the claim sued on was conflicting. It was the province of the jury to weigh the evidence and pass upon the credibility of the witnesses. They did so and by their verdict found that appellee was right in her version of the

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facts, and that her witnesses told the truth. We have read all of the evidence as abstracted and cannot say the verdict is not fully supported by it.

At the trial appellee, while admitting that at one time he had received from appellant $41 said it was not a loan but was a payment of a loan appellee had made to appellant before that time. In that connection proof of the amount of the claimed loan, and some other evidence tending to show that it had been made, was introduced over objection by appellant. We see no error in permitting this proof to be introduced. It was legitimate corroborating evidence of the claim that the $41 was not loaned to appellee but was a payment on an existing indebtedness.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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2810

Gen. No. 6637. October Term A. D. 1916. Ag. No. 86.

Frank L. Trutter, Administrator of the Estate of Joel Wilkerson, Deceased, Appellee,

vs.

Chicago & Alton Railroad Company, Appellant.

Appeal from the Circuit Court of Sangamon County

205 I.A. 48

Graves, J.

Appellee obtained a judgment in the Circuit Court of Sangamon County of $4900 in an action under the Federal Employers Liability Act, for causing the death of one Joel Wilkerson, from injuries received by him while engaged in the occupation of car inspector in the employ of appellant.

There were three counts in the declaration. In each of these counts it was alleged that appellant was operating a railroad engaged in interstate business; that the deceased was employed as a car inspector, and that part of his duty was to couple air hose between cars about to be moved; that one Sam Henson was appellant's vice principal, and the deceased Wilkerson's superior; that the deceased was engaged on track No. 1, in coupling the air hose between two cars that were about to start on an interstate trip, and that the said Henson knew it.

In the first count it is charged that Henson knew that the switch engine was moving cars to be placed on track one and knew the danger the deceased was in, due to moving of such cars, and that Henson failed to warn Wilkerson of the approach of the cars.

The second count charged that Henson knew of the dangerous

position of Wilkerson but did nothing to warn him of the danger or to prevent the placing of the cars on the track, and that the switching crew, without warning Wilkerson, kicked the cars in on track No. 1.

The third count charges that Henson negligently failed to warn Wilkerson of the approach of the cars or to prevent the cars from being shunted in on track No. 1.

It is nowhere charged that it was negligence to shunt the cars in on track No. 1. or that they were shunted in on track No. 1 in a negligent or unusual manner, or that it was the duty of appellant or of Henson or of any of the servant of appellant to warn Wilkerson that cars were about to be shunted in on track No. 1 or that it was the duty of appellant or of any of its officers or servants to do or perform any other act or thing that

was omitted to be done. Neither were any facts averred showing that appellant owed Wilkerson such duties. The nearest to such an averment there is in the declaration is found in the third count where it is said "It became the duty of Henson as vice-principal of defendant to use reasonable care to see that the said deceased was not injured," and that he did not warn him of the approach of the car that was to be shunted in on track No. 1 or to prevent it from being so shunted in, but it is not stated that in order to use reasonable care to see that Wilkerson was not injured, it was necessary to notify him that a car was about to be shunted in on track No. 1.

The proof fails to show how Wilkerson was injured, what he was doing when he was injured, or what car ran over or against him. No one

saw him injured and the last person that saw him before he was injured was Henson who while on his way out of the yards observed some cars on track No. 1 on which the air hose was not coupled and started to couple it, but before he reached the place he saw Wilkerson coming and assuming that Wilkerson was about to couple the same hose that he had started to couple, he turned and left the yards and did not hear of the accident until the next day. When Wilkerson was found after the injury he was on track No. 3, having apparently dragged himself there after being injured from a point on track No. 1 several car lengths from the point where the uncoupled hose observed by Henson was located. There is no proof that he was injured while attempting to couple the air hose between cars or because the cars were shunted in on track No. 1 or that lack of notice that they were being shunted in, in any way contributed to his injury. The proof also shows that the usual and customary manner of placing cars in making up trains in the yards where Wilkerson was injured was to shunt them in, and that Wilkerson knew it.

The case of **McAndrews v. C. L. S. & E. Ry. Co.** 222 Ill. 232 was an action on the case for personal injuries and the question of the sufficiency of the declaration and proof were raised. The court said on page 236 of that opinion:

"In actions the character of this, it is necessary to aver and to prove three elements to make out a cause of action; (1) The existence of a duty on the part of defendant to protect the plaintiff from the injury of which he complains; (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting

from such failure."

In **Reynolds v. Grace** 115 Ill. App. 473 it is held not to be the master's duty to warn the servant of dangers incident to the usual method in which the work is done with which the servant is familiar.

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It is said in **C. & N. W. Ry Co. v. Donahue** 74 Ill. 106, "We do not understand it is the duty of the company to place one employee on the lookout to warn others of approaching danger."

In **Gerhards v. Chi. Junct. Ry. Co.** 138 Ill. App. 313 it was held not to be negligence **per se** for a railroad company to kick or shunt railroad cars about on its own tracks.

The judgment of the Circuit Court is reversed with a finding of fact to be incorporated in the records of this court that appellant was guilty of no negligence in connection with the circumstances resulting in the death of appellees decedent.

Reversed with a finding of fact.

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2811

Gen. No. 6640, October Term A. D. 1916. Ag. No. 50.

Mary M. D. Cory, et al, Appellant,

vs.

City of Hillsboro, Appellee.

Appeal From the Circuit Court of Montgomery County.

205 I.A. 49

Graves, J.

Appellants filed their bill in chancery charging that a certain highway owned by appellee had been dyked or graded up so that in times of freshet it obstructed the natural flow of water there and caused the lands of appellants to be overflowed etc; that part of that dyke or grade had been washed away by flood and that appelle was about to rebuild it to its former height, and asking for an injunction restraining appellee from so doing and requiring it to remove all such artificial obstruction in the road there, that interfered with the natural flow of water.

Appellee defended on the ground that appellants were estopped by laches from maintaining their bill; that the obstructions complained of do not obstruct the natural flow of water; that the natural creek bed or channel there was sufficient to carry off all the water that would naturally fall or come there, if the same had been kept clean but that complainants have allowed it to fill up and have allowed willows and brush to grow up there and obstruct the flow of water, contrary to the provisions of the drainage act under which a drainage district exists, which includes the lands of appellants; that part of the dyke in the road was placed there by hauling dirt taken from the

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basement of a barn they were building near there and that appellants have not been and will not be damaged by any act of appellee charged in the bill of complaint.

The finding and decree of the court as abstracted by appellant is as follows:—

> "The Court finds that the banks of Shoal creek are from 50 to 70 feet in width running southwesterly through Section two (2) town eight (8) north, range four (4) west. That a natural swale or depression existed and extended north and south on the highway known as the Hillsboro-Springfield road, about mid-way between the Cory bridge and the foot hills east of said bridge. Over which the waters in the natural course of nature passed in times of flood in a southwesterly direction. That the said road way from a line extending 30 feet east of the bridge to the foothills is within the City of Hillsboro. That about 20 or 25 years ago said highway within said city was graded from the bridge to the foothills to the height of a few inches. That about the year 1901

the highway was graded to the height of about two and one-half feet. That about three or four years ago the highway was widened and raised about one foot higher. That during freshets during 1915 the one foot that had been placed there three or four years ago had been washed off. That said highway now remains substantially at the height it did before the freshet. That the highway at present is not more than four feet in height at any point above the natural surface of the ground. That the said highway has been maintained at its present height for the last 15 or 16 years. That at one time it was built higher. That complainants own the east half of the southwest quarter of said section two. That they and their devisor, the husband and father of complainants have owned the same for more than 20 years. That complainants have resided either on said premises or within the City of Hillsboro. And had personal knowledge of the grade and the fact that a great amount of work was being done and money expended by said city in raising said road and that they did not make any effort to prevent the highway being graded until the time for filing this suit in September, 1915.

The Court finds that said highway was originally built up and constructed unlawfully and that as to the part of the prayer of the bill asking that the city be restrained from building said highway to a height greater than the same now is, and was at the time of the filing this suit was granted. And that as to that part the equity is with the complainant. That because of the personal knowledge of the complainant for a period of more than 15 years and without objection thereto the complainants have been guilty of laches and are estopped from claiming any right from the mandatory injunction for the removal of the grade as the same exists at the present time. Perpetually enjoins the city from raising or building the highway to a greater height than the same now is, unless provision is made for taking care of the overflow or compensation made to the complainants.

That the prayer of the bill seeking a mandatory injunction requiring the city to remove the present grade is denied. And that the prayer for injunction that the city be restrained from repairing and maintaining the said road at its present height be denied. That each part pay their own costs."

Appellants here were complainants below. They appeal because they were denied part of the relief prayed for in their bill and urge that in so far, the decree entered is contrary to the evidence.

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There are but a few findings of fact on which the decree is based that are controverted and an examination of the record convinces us that as to those points the findings of the court are supported by the evidence. Moreover if the findings of fact had been as appellants contend they should have been, the decree of the court would not necessarily have been changed.

The part of the decree that is adverse to appellant is based on the finding that the conduct of complainants and their ancestors in acquiescing in the creation and

maintenance of the obstruction complained of, was such as to bar them under the doctrine of laches from now obtaiinng the relief that is denied them. Laches is negligence or omission to assert a right. **Ring v. Lawless** 190 Ill. 520. Laches in a general sense is the neglect for an unreasonable and unexplained length of time to do that which could and should have been done earlier, if at all. **Babb v. Sullivan,** 43 S. C. 436; **Anderson v. Northrop** 30 Fla. 612. **Newberry v. Wilkinson** 199 Fed. 673. There is no absolute rule by which to determine what constitutes laches. That depends on the circumstances of each particular case. **Mexican Nat. Coal, Timber & Iron Co. v. Frank** 154 Fed. 217, **Stewart v. Finkelstone** 206 Mass. 28, **Harrison v. Rice** 78 Neb. 659, **Hawley v. VonLanken,** 75 Neb. 597, **Wilcoxon v. Wilcoxon** 199 Ill. 244. Laches is an equitable defense and is allowed to do justice between the parties under all the circumstances without regard to the statute of limitations or the passage of any definite period of time.

Venner v. Chicago City Ry. Co. 236 Ill. 349, **Benson v. Dempster** 183 Ill. 297, **Bates v. Gillette** 132 Ill. 287, **McNichols v. Tinsler** 127 Ill. App. 381, **Rutter v. Carothers,** 223 Mo. 631, **Stevens v. Grand Central Min. Co.** 133 Fed. **Likens v. Likens** 136 Wisc. 321, **Wilders Ex'x. v. Wilder** 82 Vt. 123. What will constitute laches in a given case rests largely in the conscience and discretion of the court, and unless that discretion is abused it will not be interfered with by a court of review. **Evans v. Woodworth** 213 Ill. 404. Failure to use reasonable diligence in bringing a bill to enforce a right after the facts are known to a complainant is fatal to his right to recover. **McKechney v. Chicago** 194 Ill. App. 539. **Sheldon v. Bookwell** 9 Wisc. 167, Hoyt v. Pawtucket Ins Etc. 110 Ill. 390. **Wilsoxon v. Wilcoxon** 230 Ill 93. Speaking of mandatory injunctions Pomeroy in his work on equity jurisprudence says "no other equitable remedy is more liable to be defeated by acquiesence or by delay on the plaintiff's part, from which acquiescence may be inferred." Pomeroy's Equity Vol. 3 Sec. 1359. In Vol. 2, Sec. 817 of the same work it is said "The equitable remedy to which this quasi estoppel by acquiescence most frequently applies is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with assessments, from committing nuisances, from trespass, or other like acts in derrogation of the plaintiff's proprietary rights."

The relief denied complainants was mandatory in

character. The grade which they sought to have removed had been there for years

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substantially in the same condition. They and those from whom they acquired the premises had sat quietly by and permitted appellee to expend its money in erecting and maintaining the grade or dyke without protest or objection. The finding of the court that appellants had slept on their rights and the decree denying that part of the relief sought was not an abuse of the discretion of the court, and the same is affirmed.

Decree affirmed.

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2812

Gen. No. 6648. October Term A. D. 1916. Ag. No. 53.

John W. Dunsworth, Appellee,

vs.

Chicago & Alton R. R. Company, Appellant.

Appeal from the Circuit Court of Greene County

205 I.A. 51

Graves, J.

Appellee shipped from Carrollton, Greene County, Illinois to East St. Louis two carloads of fat cattle. From there they were re-shipped to Von Norman, Lawler & Company, commission merchants at the Union Stock Yards, Chicago, over appellant's road. The cattle arrived at the unloading chutes of the Union Stock Yards at Chicago before noon of January 26th, 1916, but the Union Stock Yards authorities refused to unload them or to allow them to be unloaded. Appellant says the reason the Stock Yards Company refused to permit them to be unloaded was that one of the officers of that company claimed to have heard a rumor that the cattle came from Christian County, Illinois to East St. Louis and that Christian County had been quarantined by authority of the United States Government on account of the hoof and mouth disease. Appellee claims that when his agent was notified that the Union Stock Yards & Transit Company had refused to allow the stock to be unloaded there, his agent went to the general manager of the Stock Yards Company and was there informed that the reason the cattle could not be unloaded was that they came from the National Stock Yards at East St. Louis. Whatever the reason was for the refusal, permission to unload them at the Union Stock Yards at

Chicago was withheld and they were not unloaded there or delivered to the consignee, but were transported by appellant on its own initiative back to East St. Louis. The National Stock Yards at East St. Louis refused to receive them, and they were slaughtered by the East Side Packing Co. at East St. Louis at the instance of appellant and appellant sold the beef hides and fat received therefor the net sum of $3,492.07 which appellant has never paid or tendered to appellee.

In the regular course of business appellant in transporting live stock from points outside of the city to an unloading chute of the Union Stock Yards, the cars containing the same pass over a track between Western Avenue and such chute supposed to be owned by the Junction Railway Company. This track runs over ground

owned by the Union Stock Yards & Transit Company. Appellant pays the Junction Railway Company 40 cents per car for the use of this track and for directing what unloading chute the cars shall be placed at. Appellants trainmen do the actual work of conducting or transferring the cars from Western Avenue to the designated chute. The actual unloading of live stock at the unloading chute is performed by the servants of the Union Stock Yards and Transit Company in the presence of and delivers the same to the consignee or his agents. For this service appellant pays the Union Stock Yards & Transit Company 25 cents per car.

After the cattle were slaughtered and sold appellee began this suit which was tried by the Court without a jury. The finding

(Page 2)

was in favor of the plaintiff below, appellee here, and his damages were assessed at $4140 and judgment for that amount was entered against appellant.

Under very similar facts the National Stock Yards Co. at East St. Louis was held to be a common carrier connecting with the Chicago & Ill. Midland Ry. C. in **Fesser v. Chicago & Ill. Midland Ry. Co.** 267 Ill. 418, and in the same case 193 Ill. 432. See also **Interstate Commerce Commission v. C. B. & Q. R. R. Co.,** 186 U. S. 320 holding that the Union Stock Yards & Transit Co. is a connecting carrier in regard to shipments of live stock to and from its yards.

The Junction Railway Company and the Union Stock Yards & Transit Company must be held to be common carriers connecting with appellant in the shipment shown in this case. One thing is certain and that is, both the Junction Railway Company and the Union Stock Yards Company were the agents of appellant for the delivery of these cattle, hired and paid by it. each to do a certain thing in connection with the transportation and delivery of them, for whose acts, if negligently performed at all, it was liable to respond to the shipper in damages. The fact that the Stock Yards Company was hired and paid by appellant to unload and deliver the live stock to the consignee not only proves conclusively that it was the agent of appellant but also that appellant's own construction of its duty as a common carrier of live stock was that it was obliged to unload and deliver the same to the consignee.

(Page 3)

Whatever may be the rule as to the delivery by the carrier of some classes of carload freight, it is certain that under the facts in this case the whole duty of appellant as a common carrier was not preformed until the

live stock in question had been actually delivered to the consignee. **Covington Stock Yards Co. v. Keith** 139 U. S. 128.

The excuse given for not unloading this live stock and delivering it to the consignee was a false one, if it was because the same had come from Christian County a quarantined territory, for it is not pretended that the cattle were ever in that county. It was wholly insufficient if it was because the same had been shipped from the Stock Yards at East St. Louis, for no reason is given why coming from the stock yards in East St. Louis was an objection. Neither of these claimed excuses was sufficient to warrant appellant in failing to perform its common law duty to deliver these cattle to the consignee. The duty of appellant as the initial carrier to deliver this live stock to the consignee, and the failure to so deliver them being established the burden of showing a sufficient lawful excuse is on appellant, and in this is has failed.

There is nothing in the contention that the failure to deliver these cattle was due to the exercise of valid police regulations of the state or nation. If they had in fact come from quarantined territory, it may be conceded that the refusal to permit them to be unloaded would have been a justification for appellant in failing to deliver them to the consignee, but it will not do to establish the doctrine that a mere rumor, the truth or falsity of which is easy of ascertainment, is enough to justify the destruction of property rights without even an attempt to verify or disprove it. In this case appellant absolutely knew the rumor was untrue because it had but a day or two before shipped these same cattle over its own road from Greene County to St. Louis, and it also knew that Greene County is separated from Christian County by Macoupin County and that they are distant from each other at their nearest point from 30 to 35 miles.

The contention that appellee through his agent accepted the cattle is not supported by the evidence. That he was willing to accept them and did attempt to get them to dispose of, is unquestiontioned, but do what he might, he could not obtain them. One cannot be held to accept that, the possession of which is denied him.

We find no error in the record and the judgment is affirmed.

205 Ill. App. 54

2813

Gen. No. 6653. October Term A. D. 1916. Ag. No. 56.

Nokomis National Bank, Appellee,

vs.

John F. Hendricks, Appellant.

Appeal from the Circuit Court of Montgomery County.

205 I.A. 54

Graves, J.

From a judgment in the Circuit Court for $55.67 against the defendant in a suit originally begun before a justice of the peace on a promissory note purporting to have been given by the defendant for $50, the defendant appeals. The defense is that the note was a forgery and that it was not properly indorsed by an agent of the payee having authority so to do. An affidavia was filed denying both the execution and assignment of the note sued on.

The proof conclusively shows that the signature to the note was the genuine signature of appellant, and the jury so found. The point made against the assignment of the note is that the person who made it was not authorized to do so, and that the name on the back of the note is not in fact the name of the payee of it.

The note in question was made payable to the "Central Rate and Routing Agency or order." It was endorsed "Central Route and Rating Agency, M. L. Markey, Agent."

The affidavit filed by appellant denying the assignment of the note made it necessary for appellee to prove that it was duly and properly assigned by the payee therein named. **Duquesne Security Co. v. Hodgens** 182 Ill. App. 88, **Bell v. Bennett, Exrs.** 188 Ill. App. 62. See also **Campbell v. Thompson** 192 Ill. App. 415, **DeClerque v. Campbell** 231 Ill. 442.

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Where, as in this case, the payee of the note is a corporation an affidavit denying the assignment of it destroys every presumption of authority in the officer or agent purporting to make the same, and puts the burden of proving, not only the assignment, but the authority of the persons making it to do so, upon the party asserting its validity. **Walsh v. Marvel** 130 Ill. App. 305; **Johnston v. Loar** 145 Ill. App. 443.

After the assignment of a note is denied by an affidavit, the doctrine of apparent authority of an agent to make it no longer applies. It is thereafter matter of proof. **Templeton v. Hayward** 65 Ill. 178.

At the common law a party sueing on an assigned note, if the general issue was filed, was required to prove by a preponderance of the evidence the validity of both

the execution and the assignment of it. **Templeton v. Hayward** 65 Ill. 178. After the enactment in its present form of Section 52 of the Practice Act, a defendant in such a suit is not permitted to deny on the trial the validity of either the execution or assignment of a note, unless he files an affidavit or verified plea denying the validity of such execution or assignment, but when such affidavit or verified plea is filed, then the same proof must be made as in a contested case at the common law. **Slaughter v. Montgomery First Natl. Bank** 109 Ala. 157 **Saville v. Hoffstetter** 63 Mo. App. 273. Where no affidavit or verified plea is filed the same practice still prevails as did at the common law when no defense was made to such a suit except in so far as the rule is varied

(Page 2)

by Section 59 of Chapter 98 R. S. commonly referred to as the Negotiable Instrument Act, which provides in substance that every holder of a negotiable instrument is deemed **prima facie** to be a holder in due course but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

A holder in due course is one who takes the instrument under the following conditions: 1. That the instrument is complete and regular on its face. 2. That he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith for and value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Sec. 52, Chapter 98 R. S.

Nothing in either of these sections was ever intended or has ever been held to deprive a person of his right to demand proof of the validity of the execution or assignment of an instrument on which it is sought to hold him liable. Section 52 of the Practice Act provides how a party must proceed to require the holder of a note to make proof of its due and proper assignment. When that course is pursued the trial proceeds the same, and the order and burden of proof are the same, as when those same facts were contested at the common law.

(Page 3)

The endorsement on this note is not that of the payee of the note. The payee was "Central Rate and Rout-

ing Agency." It is endorsed "Central Route and Rating Agency."

Appelee says the discrepancy between the name of the payee and the name of the endorser is "trivial" and too "infinitesimal" to be noticed by reason of the fact that the holder of the note is deemed **prima facie** to be a holder in due course. We have seen that the **prima facie** presumption referred to does prevail when an affidavit or verified plea denying the assignment is filed. The discrepancy is not trival. It is the difference between a note being endorsed by the payee or not being so endorsed. The "Central Route and Rating Agency" cannot be held to be the same legal entity as the "Central Rate and Routing Acency," particularly in the absence of proof that such is the case.

The endorsement purports to be signed by M. L. Malarkey as agent. As already seen the affidavit denying the validity of the assignment of the note, put appellee to its proof of the authority of the agent to make the assignment. No proof whatever of that authority was made or attempted. Without such proof the note was no evidence of a debt due from appellant to appellee and was improperly admitted.

Appellee insists as we understand its, argument, that regardless of whether the assignment was good or bad, genuine or spurious, or whether there was any assignment attempted, still it had a right under section 51 of the Negotiable Instrument Act to sue on the note in its own name and have judgment. The section is as follows:

"The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument."

The section quoted does not say and never has been construed as meaning, that any person in whose hands any instrument in writing may be found may sue it in his own name, regardless of whether it is negotiable on delivery or not. Such a construction would be monstrous and would permit the actual temporary possessor of a stolen unassigned note payable to a definite payee or order to sue it in his own name and recover judgment.

The manifest intention of the legislature in passing that section was to have it apply to the holder in due course, of instruments that because of the way they were originally written, or because of a proper endorsement thereon, were negotiable on delivery. In accord with that view is the expresion of the Supreme Court in **Stitzel v. Miller** 250 Ill. 72, where it is said, "The note being negotiable, the endorsement of the name of the payee on its back and its sale and delivery to appellees

authorized them to maintain this action in their own names."

In Connecticut there is a statute in force which if not exactly the same as Section 59 of our Negotiable Instrument Act is substantially so and the Courts of that state said concerning the question now under consideration:

"Possession is not enough to support a recovery upon a promissory note under section 4229 of the Negotiable Instrument Act, after it once appears that he must trace his title through fraudulent practices and unclean hands. This is actually true whether the fraudulent practices were connected with the original inception of the paper or whether they occur subsequently to the prejudice of other holders." **In Re-Parsons v. Utica Cement Company** 173 Atl. 785.

In the case of **Murphy v. Skinner** (Wisc.) 151 N. W. 172 the court holds in substance that "Section 4193 of the 1913 Rev. St. of Wisconsin providing that in action on notes by endorsee, the possession of the note shall be presumptive evidence that the same was endorsed by the person to whom it purported to be endorsed, permitted the holder of a note showing his possession thereof to make a prima facia case against endorsers; but where the defense is that the endorsements were forgeries the holder has the burden of proving the genuineness of the endorsement by a preponderance of the evidence."

The first case cited by appellee in support of its conclusion is **Woodward v. Donovan** 167 Ill. App. 503, where it is said:

"The mere possession of a promissory note or bond is **prima facie** evidence of the legal title to the instrument and of the right of the one in possession to sue thereon, and in the case of an instrument of that character made payable to some person other than the one in possession, the presumption arising from possession is that the one in possession may sue thereon in the name of the person to whom it is made payable."

That is undoubtedly the law, but it falls far short of being a holding that holder other than the payee of an unindorsed note made payable to a definite person "or order" may sue thereon in his own name. See also **Ransom v. Jones** 1 Scam. 291, **Martin v. Martin** 174 Ill. 371, **Curtis v. Martin** 20 Ill. 557.

Our conclusion is that the filing of an affidavit or verified plea denying the validity of an assignment of negotiable paper challenges among other things the right of the holder of it to sue it in his own name, and puts him to proof of the **bona fides** of the assignment through which he claims the right to sue.

The judgment of the Circuit Court is reversed and the cause is remanded to that court.

Reversed and Remanded.

GEN. NO. 6653. OCTOBER TERM A.D. 1916. AG. NO. 56

NOKOMIS NATIONAL BANK. APPELLEE,

VS.

JOHN F. HENDRICKS, APPELLANT.

APPEAL from the CIRCUIT COURT OF

MONTGOMERY COUNTY.

GRAVES, J.

From a judgement in the Circuit Court for $55.67 against the defendant in a suit originally begun before a justice of the peace on a promissory note purporting to have been given by the defendant for $50, the defendant appeals. The defense is that the note was a forgery and that it was not properly in - dorsed by an agent of the payee having authority so to do. An affidavia was filed denying both the execution and assignment of the note sued on.

The proof conclusively shows that the signature to the note was the genuine signature of appellant, and the jury so found, The point made against the assignment of the note is that the person who made it was not authorized to do so, and that the name on the back of the note is not in fact the name of the payee of it.

The note in question was made payable to the "Central Rate and Routing Agency or order." It was endorsed "Central Route and Rating Agency, M.L. Markey Agent."

The affidavit filed by appellant denying the assignment of the note made it necessary for appellee to prove that it was duly and properly assigned by the payee therein named. DUQUENE SECURITY CO. V. HOUGENS 182 ILL. APP. 88 BELL V. BENNETT,EXRS. 188 ILL. APP. 62. See also CAMPBELL V. THOMPSON 192 ILL. APP. 415, DeCLERQUE V. CAMPBELL 231 ILL. 442.

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Where, as in this case, the payee of the note is a corporation an affidavit denying the assignment of it destroys every presumption of authority in the offi or agent purporting to make the same, and puts the burden of proving, not only the assignment, but the authority of the persons making it to do so, upon the party asserting its validity. WALSH V. MARVEL 130 ILL. APP. 305; JOHNSTON V. LOA 145 ILL. APP. 443.

After the assignment of a note is denied by an affidavit, the doctrine of apparent authority of an agent to make it no longer applies. It is thereafter matter of proof. TEMPLETON V. HAYWARD 65 ILL. 178.

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verified plea denying the validity of such execution or assignment, but when suc affidavit or verified plea is filed, then the same proofmust be made as in a contested case at the common law, SLAUGHTER V. MONTGOMERY FIRST NATIONAL BANK. 1 ALA. 157 SAVILLE V. HOFFSTETTER 63 MO. APP. 373. Where no affidavit or verified plea is filed the same practice still prevails as did at the common law when no defense wasmade to such a suit except in so far as the rule is varied

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Appelee says the discrepancy between the name of the payee and the name of the endorser is "trivial" and too "infinitesimal" to be noticed by reason of the fact that the holder of the note is deemed PRIMA FACIE to be a holder in due course. We have seen that the PRIMA FACIE presumption referred to does prevail when an affidavit or verified plea denying the assignment is filed. The discrepancy is not trival. It is the difference between a note being endorsed by the payee or not being so endorsed. The "Central Route and Rating Agency" cannot be held to be the same legal entity as the "Central Rate and Routing Agency," particularly in the absence of proof that such is the case.

The endorsement purports to be signed by M.L. Malarkey as agent. As already stated the affidavit denying the validity of the assignment of the note, put appellee to its proof of the authority of the agent to make the assignment. No proof whatever that authority was made or attempted. Without such proof the note was no evidence of a debt due from appellant to appellee and was improperly admitted.

Appellee insists as we understand its, argument, that regardless of whether the assignment was good or bad, genuine or spurious, or whether there was any assihnment attempted, still it had a right under section 51 of the Negotiable Instrument Act to sue on the note in its own name and have judgement. The section is as follows:

"The holder of a negotiable instrument may sue thereon in his name and payment to him in due course discharges the instrument."

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The section quoted does not say and never has been construed as meaning, that any person in whose hands any instrument in writing may be found may sue it in his own name, regardless of whether it is negotiable on delivery or not. Such a construction would be monstrous and would permit the actual temporary possessor of a stolen unassigned note payable to a definite payee ororder to sue it in his own name and recover judgment.

The manifest intention of the legislature in passing that section was to have it apply to the holder in due course, of instruments that because of the way

they were originally written, or because of a proper endorsement thereon, were negotiable on delivery. In accord with that view is the expression of the Supreme Court in STITZEL V. MILLER 250 ILL. 72, where it is said, "The note being negotiable, the endorsement of the name of the payee on its back and its sale and delive to appellees authorized them to maintain this action in their own names."

In Connecticut there is a statute in force which if not exactly the same as Section 59 of our Negotiable Instrument Act is substantially so and the Courts of that state said concerning the question now under consideration:

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In the case of MURPHY V. SKINNER (WISC.) 151 N.W. 172 the court holds in substance that "Section 4193 of the 1913 Rev. St. of Wisconsin providing that in action on notes by endorsee, the possession of the note shall be presumptive evidence that the same was endorsed by the person to whom it purported to be en - dorsed, permitted the holder of a note showing his possession thereof to make a prima facie case against endorsers; but where the defense is that the endorsements were forgeries the holder has the burden of proving the genuineness of the endorsement by a preponderance of the evidence."

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The first case cited by appellee in support of its conclusion is WOODWARD V.DONOVAN 167 ILL. App. 503, where it is said:

"The mere possession of a promissory note or bond is PRIMA FACIE evidence of the legal title to the instrumentand of the right of the one possession to sue thereon, and in the case of an instrument of that character made payable to some person other than the one in possession, the presumption arising from possession is that the one in possession may sue thereon in the name of the person to whom it is made payable."

That is undoubtedly the law, but it falls far short of being a holding that holder other than the payee of an unindorsed note made payable to a definite per - son "or order" may sue thereon in his own name. See also RANSOM V. JONES 1 Scam. 291, MARTIN V. MARTIN 174 ILL. 371, CURTIS V. MARTIN 20 ILL. 557.

Our conclusion is that the filing of an affidavit or verified plea denying the validity of an assignment of negotiable paper challenges among other things the rightof the holder of it to sue it in his own name, and puts him to proof of the BONA FIDES of the assignment through which he claims the right to sue.

The judgment of the Circuit Court is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

Gen. No. 6670. October Term A. D. 1916. Ag. No. 68.

Charles T. Smith, Appellee,

vs.

Village of Sidell, a Municipal Corporation, Appellant

Appeal from the Circuit Court of Vermilion County

205 I.A. 66

Graves, J.

This is an appeal from a judgment for $100 in a suit for personal injuries received by appellee in a collision between an automobile driven by him and a rope that had been stretched across one of the streets of appellant village by its authorities to keep travel off from it while some road oil that had been placed thereon for the improvement of the road was fresh.

It is not denied that appellee was injured or that the rope as stretched across the street constituted a dangerous obstruction. The amount of the injuries received by appellee and whether the same were received by reason of the negligence of appellant to properly warn the travelling public by lights or otherwise of the existence of the obstruction, or because of the negligence of appellee in driving into the rope, are all questions to be determined by the jury and have all been determined by that body against the contentions of appellant. We have read all of the evidence as abstracted and after carefully considering it, are unable to say that it does not fully warrant the verdict found.

Certain instructions are criticised chiefly as imposing on the village a duty to do more than to exercise reasonanle care to see to it that its streets were in reasonably safe condition for travel.

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The instructions are not subject to the criticism made nor are any of them harmfully erroneous in any other respect complained of.

The criticism made of rulings of the court on the introduction of evidence are extremely "far fetched" and are untenable.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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2816

Gen. No. 6674. October Term A. D. 1916. Ag. No. 71

George P. Bridwell, Appellee,

vs.

John W. Utt, Appellant.

Appeal from the County Court of Macoupin County.

205 I.A. 67

Graves, J.

Appellant appeals from a judgment in favor of appellee for $275.23, which judgment was rendered for groceries sold by appellee to one Peter D. Utt, a brother of appellant, and charged to him on the books of appellee. Appellee claims that while the goods were charged to Peter D. Utt they were in fact sold on the credit of appellant. In proof of this claim evidence was introduced that tends to show that appellant said to appellee in substance "Let Peter have the goods and I will stand for them," and that appellant had said to another witness that he was "standing for Peter."

Appellant first denies that he ever said these things and next insists that even if he had said them, he was in no way bound by what he said because it was not in writing; was nothing more at the best than the promise to pay the debt of another, was without consideration and was void under the statute of frauds.

The case was tried by the Court without a jury.

The proof shows that even after appellee claims the statements were made on which he relies, the goods that are now sued for were not only delivered to Peter Utt, but were charged to him. That circumstance alone, all but conclusively establishes it to be a fact, that appellee regarded the obligation to pay them to be originally that of

(Page 1)

Peter and not of appellant. **Hartman v. Bradley** 85 Ill. 162, **Bonner & Marshall Co. v. Hansell** 189 Ill. App. 474

The proof also shows that after the account had been running for some time and had become a matter of some little moment, appellee obtained from Peter notes and a chattel mortgage on some horses and crops and gave a credit to Peter on the account of $175. He also allowed Peter to sell part of the mortgaged property and received only a trifle over $100 for the same. He also sought to enforce his lien against the mortgaged horses. Appellant never paid anything of his own money on the account. These circumstances are very persuasive that the credit was given to Peter and not to appellant. **Lusk v. Throop** 189 Ill. 127.

Appellee says he gave credit to appellant, but every act of appellee disproves his statement.

In determining whether a promise is original or collateral the test is whether the credit is given to the person sought to be charged or to some one else. **Lusk v. Throop** 189 Ill. 127.

Under all the circumstances in this case we are irresistibly forced to the conclusion that the credit was given to Peter Utt, and that even if the promises were made by appellant as appellee claims, they create no liability on appellant to pay the bill because of the provisions of the statute of frauds.

The judgment of the County Court is reversed.

Judgment reversed.

2817

Gen. No. 6675. October Term A. D. 1916. Ag. No. 89.

Eli R. Wagler and Noah Wagler, doing business under the firm name of Wagler Brothers, Appellants,

vs.

James A. Norris, Appellee.

Appeal from the Circuit Court of Tazewell County

205 I.A. 69

Graves, J.

Appellants sued to recover commissions claimed to have been earned by them for selling certain real estate for appellee. From a judgment against them in bar of their action and for costs they appeal.

The declaration consists of one special count and the common counts. The substance of the special count is that plaintiffs under a contract with defendant to sell his farm for $10,000 and to receive therefor all they obtained for it over and above $10,000, found him a purchaser who offered him $12,000 for it, but later bought it from him at $11,750. In their affidavit of claim they ask for $1175. In their statement of facts and argument they ask for $750 under the special count and in lieu of that amount they ask that they be allowed $500 as agreed commission.

Appellee by his affidavit of meritous defense denied having engaged or authorized appellants to sell the farm for him under any circumstances or for any price or that they did sell it or were instrumental in selling it, or that they or any purchaser produced by them ever offered him $12,000 or any other amount in cash for it.

The proof strongly tends to show the facts to be that appellee had advertised the farm for sale for $10,000 that the advertisement was answered by one in the employ of appellant who represented himself

to be or have a purchaser for it at $10,000, but who neither bought it or brought a purchaser for it; that some negotiations were had between appellants agent and appellee concerning the sale of the farm for $10,000 but the offer to take $10,000 for it was conditioned upon the offer being accepted and the deal closed by December 1, 1914; that appellant neither accepted nor offered to accept the lands at the price named before December 1, 1914; that while appellee did later trade it off to one Ludermann for other property, some cash and a secured note, the purchaser refused to deal at all if appellants had anything to do with the transaction.

The evidence further strongly tends to prove that

appellants were never authorized to either sell or procure a purchaser for the farm in question, but that what they did was as interlopers, at their own instance, and created no liability on the part of appellee to pay them anything therefor.

The verdict of the jury for appellee is in accord with what we consider the decided weight of the evidence.

In the evidence for appellants in chief Eli Wagler testified that appellee came into the office of appellants after having paid a visit to the house of one Ludermann and that appellee and both appellants there talked over the proposed deal and that appellee there agreed to pay appellants $500 as a commission if the deal was made, provided appellee accepted the house as a part of the consideration. Appellee while on the witness stand denied that he met Eli Wagler at that time or place. On rebuttal appellant sought to corroborate the testimony

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of Eli Wagler by proving by another witness that he had seen appellee and Eli Wagler together at the time and place in question. This, evidence would have been competent if offered as a part of appellants case in chief, but could not be introduced in rebuttal as a matter of right. There was no error in excluding the evidence at the time it was offered.

Appellants complain that one of the instructions he offered was modified by the court by adding the words "and sale" after the word "purchaser" in the clause "and that their services were instrumental in securing a purchaser and sale." The change is insignificant, and we are unable to see how any juror could have gained from the words added any misconception of the case.

Some of the instructions given at the instance of appellee are not well drawn, but they are not seriously wrong. Even if they were wrong, the verdict and judgment so thoroughly comport with the manifest justice of the case, that we do not feel justified in disturbing it.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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2815

Gen. No. 6680. October Term A. D. 1916. Ag. No. 74.

Muskegon Tool and Stamping Company,
Appellee,

vs.

Allith-Prouty Company, Appellant.

Appeal from the Circuit Court of Vermilion County.

205 I.A. 70

Graves, J.

It is impossible from reading the briefs and arguments of both sides to tell what this suit was brought to recover. Appellant says "the cause of action * * * * arose out of a purchase by appellant from appellee of certain dies used in making a hinge known as the "King Hinge," but what it was that "arose" is kept a profound secret so far as the briefs and arguments are concerned. What is discussed is the defense. It is therefore probably safe to assume that whatever the plaintiff's claim was, it was fair on its face.

The defense was based on the claim that certain dies that were purchased by appellant from appellee were not fit for the uses for which they were purchased and that they were not as represented.

The evidence regarding the merits of the defense is conflicting. It consists of the testimony of witnesses sworn and examined in open court among which were several mechanical experts who testified to the condition of the dies in question. The dies themselves were also introduced in evidence. These dies have not been made part of the bill of exceptions and are not before us for inspection. We cannot determine the weight of the evidence when only part of it is before us.

Ferris v. Ferris 189 Ill. 452, **Board of Trustees v. Misenheimer, et al,** 189 Ill. 151.

(Page 1)

When all of the evidence is not contained in a bill of exceptions, it will be presumed in support of a judgment, that there was all the evidence necessary to justify the one rendered. **C. B. & Q. R. R. Co. v. The People,** 139 Ill. 536.

When one Charles Prane was on the stand as a mechanical expert he was asked "Would the dies in the condition they were in when you tried them out produce these hinges so that they could be commercially marketable?" Objection to this question was sustained. There are several reasons why it was improper. **First:** The defense interposed, raised the question whether the dies sold were fit for the uses for which they were purchased, namely, to make the King Hinge with. The question put called for an opinion whether the dies

would produce hinges that would be **commercially marketable.** Whether or not a thing is commercially marketable depends in part on whether the thing itself, however well made, would be salable. Even if that could be under any circumstances a question for expert testimony, it was not involved in this case. It is not claimed that appellee guaranteed the hinges would be commercially marketable. **Second:** The question was answered in the negative. The answer remained in the record and appellant had the full benefit of it.

When Edward G. Carter, the president of appellee company, was on the stand the following incident occurred:

> "Q. You know, did you not, that Mr. Willard was coming to Muskegon on the day he came there for the purpose of looking over the two dies and the stock?"
>
> "A. I didn't know what day he was coming; I knew he was coming."
>
> "Q. You knew he was coming, and didn't you have word he was coming that day?"

An objection to the last question was sustained. There was no error in that ruling. If the question was pertinent, it had just been

(Page 2)

answered. The witness had just said he knew he was coming but he did not know what day. There was no occasion to clog the record with a repetition of it.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

(Page 3)

6253

2821

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

205 I.A. 80

R-H Dec Apr 12/17

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6363.

A. L. Pulver et al appellees.

vs Appeal from City Ct. Moline.

Harry Ainsworth, appellant.

Niehaus, P. J.

This is an action brought in assumpsit, by the appellees, A. L. Pulver and J. H. Kohlman, real estate agents, doing business as Pulver-Kohlman Land Agency, in the City Court of Moline, against the appellant, Harry Ainsworth, to recover commissions which they claim to be due them from the appellant, for services rendered in arranging a contract between the appellant and R. and G. A. Shallberg, to trade and exchange real estate. The declaration consists of three special counts, seven additional special counts, and the consolidated common counts; to which appellant filed the general issue.

A trial by jury was had, and the jury returned a verdict finding the issues joined for the appellees, and assessing their damages at $980; whereupon the appellant made a motion for a new trial, which was overruled, and judgment was entered upon the verdict; from which judgment this appeal is taken.

The principal errors assigned by the appellant, are, a misjoinder of appellees as plaintiffs; the admission of improper evidence for appellees; a denial of the right to a proper cross examination of appellees witnesses; and that instructions were improperly given for the appellees, as well as proper instruction refused which were requested by appellant; also the modifying of instructions which were asked by the appellant. It is contend that the evidence shows, that the appellees acted in a dual capacity, and in so doing were guilty of bad faith; and that the services of appellees did not result in a contract for the exchange of the properties, between the parties; and that therefore the appellees were not entitled to a verdict and judgment.

Gen. No. 6363.

A. L. Pulver et al Appellees.

ve Appeal from City Ct. Moline.

Harry Ainsworth, Appellant.

Nielsen, P. J.

This is an action brought in assumpsit, by the appellees A. L. Pulver and J. N. Kohlman, trading under the name of Pulver-Kohlman Land Agency, in the City Court of Moline, against the appellant, Harry Ainsworth, to recover commissions which they claim to be due them from the appellant, for services rendered in arranging a contract between the appellant and R. and O. A. Chamberg, to trade and exchange real estate.

The declaration makes complaint of three special counts, seven additional counts special counts, and the consolidated common counts; to which appellant filed the general issue.

A trial by jury was had, and the jury returned a verdict finding the issues joined for the appellees, and assessing their damages at $250; whereupon the appellant made a motion for a new trial, which was overruled, and judgment was entered upon the verdict; from which judgment this appeal is taken.

The principal errors assigned by the appellant, are, a misjoinder of appellees as plaintiffs; the admission of improper evidence for appellees; a denial of the right to a proper cross examination of appellees witnesses; and that instructions were improperly given for the appellees, as well as proper instructions refused which were requested by appellant; also the verdict of instructions which were asked by the appellant. It is contended that the evidence shows, that the appellees acted in a final capacity, and in no sense were guilty of any fraud; and that the services of appellees did not result in a contract for the exchange of the properties, between the parties; and that therefore the appellees were not entitled to a verdict and judgment.

The burden of appellants argument pertains to the matter of misjoinder; and the bad faith alleged because of a dual agency. These matters, however, are really questions of fact, which were submitted to and passed upon by the jury. The appellee A. L. Pulver testified, that when he commenced to negotiate with the appellant, concerning the land trade in question, he was in partnership with J. H. Kohlman, and had been for about six months prior to that time; that appellant's attention was called to this fact; and that the transactions between them were had, with a full knowledge on the part of appellant, that Pulver was not acting in his individual capacity, but as a member of the firm; and that during the negotiations which took place concerning the trade of the real estate, the appellee J. H. Kohlman was his partner; and furthermore, that the firm was transacting business in an office which had been designated by a sign on the office door; "Pulver-Kohlman Land Agency"; which office appellant repeatedly visited during the negotiations concerning the contract, which it is claimed, was finally made between appellant and R. and C. A. Shallberg; and that Kohlman was introduced to appellant as a partner. He also testifies, that appellant was fully informed by Pulver, of the fact, that appellees could by acting in the double capacity of agents for him, as well as for the Shallbergs, reduce the amount of commissions which he would have to pay them if the trade which he wanted to make with the Shallbergs, was consummated; and that he agreed to it; that appellant agreed to an unisex arrangement by which they were to receive as part of their compensation for the services that they were about to render, fifty cents an acre for the land which the Shallbergs were seeking to exchange for the city property of appellant, situated in the city of Moline.

It is true, that the appellant, as a witness, denied that he knew, that the transactions of A. L. Pulver with him were

transactions in which the partnership was concerned; and he denied, that he had any knowledge of the fact, that appellees were acting in a dual capacity; and that the matter was concealed from him. And it is contended therefore, that this concealment testified to by him, was sufficient evidence of bad faith on the part of appellees as his agents, to bar a recovery. Whether the appellee A. L. Pulver was to be believed concerning these matters about which there is this conflict in the evidence, or the appellant, was a question of fact for the jury to determine The jury saw the witnesses, heard them, and observed their manner and conduct while testifying, and in weighing their testimony were in the best position to judge where the truth lay in this controversy/ Under the circumstances presented by the record, it is apparent that this court would not be warranted in holding that they should have found differently upon these questions.

We find no reversible error in the record concerning the admission or rejection of evidence during the trial. While it is true, that the court might properly have allowed a more extended cross examination, concerning some of the matters testified about in chief, yet it does not appear that the appellant's right to cross examine was materially or unduly abridged.

It is urged by appellant, that Instruction No. 3, given for the appellees, is erroneous, because it does not contain a statement of the requirement, that before the appellees had a right to recover, the appellant must not only have known of appellees' dual agency, but must have agreed to it; and agreed to the receiving by the appellees, of a commission from the Shallbergs, as well as from him. There is no doubt but that this element was a necessary one as a basis for a recovery by appellees; and the case was tried on that basis; and the allegations in the pleadings, and the proofs introduced, were upon the theory of the necessity of proof of such knowledge and consent;

and while it is true, that the instruction in question, does not expressly call attention to this feature of the case, the jury were clearly instructed to that effect, in other instructions. Instruction No. 1, given on the part of the appellees, directly called the attention of the jury to the fact, that both knowledge and agreement on the part of the appellant, were necessary elements to justify a verdict for appellees; the eighth instruction given for the appellant, also told the jury definitely, that it was incumbent on the appellees, before a recovery could be had, to prove by a preponderance of the evidence, that the appellant agreed, that appellees should receive a portion of their commissions from Robert and G. A. Shallberg; so that the point involved was fully covered by other instructions in the case. When these other instructions are considered in connection with the instructions complained of, as they should be, it is evident that the jury could not have been misled on this point, and therefore no reversible error was committed.

Appellant also complains, because the 12th. instruction requested by him, was modified. We are of opinion that the modification was proper; the only effect of the modification was to make the point presented by the instruction, as to whether Pulver acted in his individual capacity, or as a member of the firm, more clear, and thereby avoid the possibility of the jury being misled by the vagueness of the language of the instruction, as originally drawn and presented. We are of opinion that the jury were fully and fairly instructed with reference to the law involved in the case, which had a bearing upon the proofs. No substantial ground appears for disturbing the verdict of the jury or the judgment of the court.

Judgment affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2823

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

205 I.A. 10

P-H Dec Aff 12/17

BE IT REMEMBERED, that afterwards, to-wit: on FEB 10 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6333.

The People of the State f Illinois.

Defendant in error.

vs Error to Co. Ct. Lake.

Thomas H. McCann, Plaintiff in error.

Dibell, J.

An information of seventeen counts was filed June 19, 1916, in the County Court of Lake County against Thomas H. McCann, charging him with violations of the act relating to anti-saloon territory. He was convicted under three counts, including the nuisance count, and was fined an aggregate of $350. and was sentenced to imprisonment for thirty days in the county jail and there was an order to abate the nuisance and defendant brings the judgment here for review.

There was plenty of evidence introduced by the state to sustain more than three convictions. Defendant testified that his cider was not intoxicating and that the buck he sold was not a malt liquor. He called witnesses who testified that the cider which they drank at his place was not intoxicating and that the buck which they drank there was not a malt liquor There was no proof that they drank from the same body of liquor or from the same bottles as the detectives. They did not confine their testimony to a period before the information was filed, but apparently brought their testimony down to the day of trial, which began on August 2nd. The jury believed the witnesses for the State. We see no ground on which we can reasonably disturb that conclusion. All the other contentions of defendant are determined adversely to him in People v McCanney, Gen. No. 6331.

The judgment is therefore affirmed.

Gen. No. 8333.

The People of the State of Illinois,

Defendant in error.

vs. Error to Co. Ct. Lake.

Thomas H. McCann, Plaintiff in error.

Dibell, J.

An information of seventeen counts was filed June 19, 1916, in the County Court of Lake County against Thomas H. McCann, charging him with violations of the act relating to malt liquor traffic. He was convicted under three counts, imposing the minimum court, and was fined on each count of $100. and was sentenced to imprisonment for thirty days in the county jail and there was an order to state the evidence and defendant brings the judgment here for review.

There was plenty of evidence introduced by the state to sustain more than three convictions. Defendant testified that his other was not intoxicating and that the drink he sold was not a malt liquor. To both witnesses who testified that the other which they drank at his place was not intoxicating and that the drink which they drank there was not a malt liquor or from the same bottles as the intoxicating. They did not contine their testimony to a period before the information was filed. There was no proof that they drank from the same body of liquor but apparently brought their testimony down to the day of trial, which began on August 8th. The jury believed the witnesses for the State. To see no ground on which we can reasonably disturb that conclusion. All the other contentions of defendant are determined adversely to him in People v McChesney, Gen. No. 8331. The judgment is therefore affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6334

2826

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

205 I.A. 105

R-H Dyl Apr 12/17

BE IT REMEMBERED, that afterwards, to-wit: on
FEB 10 1917
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6334.

The People of the State of Illinois,

Defendant in error.

vs Error to Co. Ct. Lake.

Mike McGuire, Plaintiff in Error.

Dibbell, J.

An information was filed in the court below against Mike McGuire on June 19, 1916, containigg seventeen counts, wherein he was charged with violations of the act relating to anti-saloon territory. He was found guilty underfour counts, including a nuisance count, was fined an aggregate sum of $350. and was sentenced to the county jail for forty days, and there was an order to abate the nuisance. and defendant brings the judgment here for review.

The state introduced proof of numerous sales by defendant of buck, alco and cider; and proof that the buck and alco were malt liquors and the cider intoxicating. The People's chemist confirmed this proof as to the samples of each which were submitted to him. The defende produced witnesses who testified that they had drunK buck, alco and cider in defendant's place since the town became dry and that in their opinion the buck and alco were not malt liquors and the cider was not intoxicating. One of them on cross examination would not testify whether the buck was intoxicating. There was no proof that these witnesses drank from the same body of liquor or from the same bottles as the detectives. There was proof of sales of buck sufficient to justify a verdict against defendant on much more than four counts, without including the other drinks. We see no grounds on which we could reasonably disturb the conclusion of the jury on the facts. All defendant's other contentions are decided adversely to him in People v McCanney, Gen. No. 6331.

The judgment is therefore affirmed.

The judgment is therefore affirmed.

Gen. No. 8221.

The People v MacGannay.

Error to Co. Ct. Lake.

Defendant in error.

Mike McGuire, Plaintiff in Error.

vs

Gen. No. 8234.

The People of the State of Illinois,

Defendant in error.

Error to Co. Ct. Lake.

Dibell, J.

An information was filed in the court below against Mike McGuire on June 18, 1912, containing seventeen counts, wherein he was charged with violations of the act relating to anti-saloon territory. He was found guilty under four counts, including a misdemeanor count, was fined an aggregate sum of $250. and was sentenced to the county jail for forty days, and there was an order to state the misdemeanor. and defendant brings the judgment here for review.

The state introduced proof of numerous sales by defendant of buck, also and other; and proof that the buck and also were malt liquors and the other intoxicating. The People's chemist confirmed this proof as to the samples of each which were submitted to him. The defense produced witnesses who testified that they had drunk buck, also and other in defendant's place since the town became dry and that in their opinion the buck and also were not malt liquors and the other was not intoxicating. One of these on cross examination would not testify whether the buck was intoxicating. There was no proof that these witnesses drank from the same body of liquor or from the same bottles as the testatives. There was proof of sales of buck sufficient to justify a verdict against defendant in no more than four counts, without including the other drinks. We see no reason on which we could reasonably disturb the conclusion of the jury on the facts. All defendant's other contentions are decided adversely to him in People v MacGannay, Gen. No. 8221.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6335

2827

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

205 I.A. 106

R-Hpn Apr 12/17

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6335.

The People of the State of Illinois

Defendant in error.

vs Error to County Court Lake.

George Cessar, Plaintiff in error.

Dibell, J.

An information was filed against George Cessar, charging him with violations of the anti-saloon territory law. He was found guilty under thirteen counts, including the nuisance count and was filed, in the aggregate, $600. and was sentenced to seventy days in jail, and there was an order to abate the nuisance and defendant brings the judgment here for review.

There was proof of sales of twelve drinks of cider, and the chemist for the State analyzed it as containing 9.96 alcohol by volume, and testified that it was an intoxicating liquor. The only defense was that the defendant never sold cider to the two detectives so far as he knew. The only question in doubt is whether, upon proof justifying a conviction under the twelve counts, the same proof will also authorize a conviction under the thirteen or nuisance count. We conclude that such c conviction can be had. 23 CYC 176. All other questions are determined adversely to defendant in People v McCanney Gen. No 6331.

The judgment is therefore affirmed.

Gen. No. 6336.

The People of the State of Illinois

Defendant in error.

va Error to County Court Lake.

George Cessar, Plaintiff in error.

Dibell, J.

An information was filed against George Cessar, charging him with violations of the anti-saloon territory law. He was found guilty under thirteen counts, including the misdemeanor count and was fined, in the aggregate, $300. and was sentenced to seventy days in jail, and there was an order to abate the nuisance and injunction brings the judgment here for review.

There was proof of sales of twelve kinds of cider, and the chemist for the State analyzed it as containing 3.95 alcohol by volume, and testified that it was intoxicating liquor. The only defense was that the defendant never sold cider to the two detectives so far as he knew. The only question in dispute, upon proof justifying a conviction under the twelve counts, the same proof will also authorize a conviction under the thirteen or nuisance count. We conclude that such a conviction can be had. 82 CYC 1176. All other questions are determined adversely to defendant in People v McCluney Gen. No. 6337.

The judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6330

2825

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

205 I.A. 107

P-H Dec apr 12/17

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 10 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6336

The People of the State of Illinois

Defendant in Error

vs Error to Co. Ct. Lake

Joe Polansek, Plaintiff in error.

Mibell, J.

An information was filed against Joe Polansek in the court below charging him with violations of the act relating to anti-saloon territory, There were fifteen counts, the last of which was a nuisance count. He was found guilty under all the counts, and was fined the aggreg te sum of $600 and was sentenced to jail for sixty days, and the nuisance was ordered abated and defendnt brings the judgment here for review.

The People proved twelve sales of cider, and that that which was furnished was intoxicating kiquor. Defendant testified that what he sold was sweet cider and introduced the evidence of the man from whom he bought it shortly before these sales, tending strongly to show that it was sweet cider and not hard cider or fermented liquor. So far as the cider is concerned, weare of opinion that the jury were not warranted in finding that it was proved beyond a reasonable doubt that it was intoxicating. There appears, however to be proof of fiftaen sales of other drinks, which were testified to be a malt liquor, and this therefore seems to be sufficient to support the verdict. All other contentions by defendant are determined against him in the People v McCamney, Gen. No. 6331.

The judgment is therefore affirmed.

Gen. No. 6318

The People of the State of Illinois

Defendant in Error

Fe Error to Cir. Ct.

Joe Polansky, Plaintiff in error.

Mipell, J.

An indictment was filed against Joe Polansky in the court below
charging him with violations of the act relating to anti-saloon
territory. There were fifteen counts, the last of which was a
nuisance count. He was found guilty under all the counts, unless
fined the sum of $500 and was sentenced to jail for
sixty days, upon the nuisance was entered against defendant
brings the judgment here for review.

The People proved beyond doubt, and that
which was instituted was injunctive filed. Defendant testified
that what he sold was sweet cider and intended the evidence
of the men from whom he bought it shortly before these suits,
testified strongly to show that it was sweet cider but very
cider or fermented liquor. So far as the cider is concerned,
were of opinion that the jury were not warranted in finding
That it was proved beyond a reasonable doubt that it was intox-
icating. There a point, however, to be tried of fifteen suits
of other kinds, which were testified to be a malt liquor, and
this therefore seems to be sufficient to support the verdict.
All other contentions by defendant are disposed against him
in The People v McCarthy, Gen. No. 6321.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6314

2829

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

205 I.A. 108

R. H. Dun agt 19.1917

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 1 9 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Katherine L. Fessenden,
Appellee,
-vs.
Travelers Insurance Company,
Appellant.

Appeal from the City Court of Aurora.

DIBELL, J.

On December 23, 1914, C. N. Fessenden, fell upon a street in Chicago and received a wound upon the back of his head, and was carried into a tailor's shop nearby and died in ten or fifteen minutes. He held a policy of accident insurance issued by the Travelers Insurance Company, dated October 1, 1897, wherein his wife, Katherine L. Fessenden, was the beneficiary. She brought this suit upon the policy in the city court of Aurora and had a verdict and a judgment for $7,500. It was admitted that the policy was still in force at the time of her husband's death and that the policy and its accumulations amounted to $7,500, and that she was entitled to recover that amount, if anything. This is an appeal by the insurance company.

The policy insured against death resulting from bodily injuries during the term of the insurance, through external, violent and accidental means, independently of all other causes, and it provided that the policy did not cover accident or death resulting wholly or partly, directly or indirectly, from disease. This policy was similar to that discussed by us in Crandall v. Continental Casualty Co., 179 Ill.App. 230, and we adhere to the construction of such a policy which we there adopted, without repeating the reasoning or the authorities there used.

6544. 47.

Katherine L. Tennyson,

-vs-

Travelers Insurance Company,

DIARY, 1.

In Chicago one received a wound upon the head of his head, and was a rifle into a fellow's chest nearby and died in less a fifteen minutes. He left a policy of accident insurance issued by the Travelers Insurance Company, dated October 1, 1927, whereby his wife, Katherine L. Tennyson, was the beneficiary. The premium this suit upon the policy on the city court of Akron was a verdict and a judgment for $4,500. It was admitted that the policy was still in force at the time it was issued a suit was brought to recover that amount, it appeared. This is re sisted by the insurance company.

The policy insured against death resulting from bodily injuries during the term of the insurance, through external, violent and accidental means, inclusive only of all other causes, and it provided that the policy did not cover accidents or death resulting wholly or partly, directly or indirectly, from disease. This policy was similar to those issued by us in Crandall v. Continental Casualty Co., 129 Ill.App. 549, and we adhere to the construction of such a policy which we there adopted, without repeating the reasoning of the authorities there used.

Plaintiff introduced the policy, and proved by several witnesses that at the time of his death Fessenden was sixty-eight years old; that he was in good health; that he had never been known to have any fainting spells; that he walked up stairs without any shortness of breath; had never complained of pain in his heart or chest, or exhibited any shortness of breath; that his habits were exemplary in every way ; that he always appeared to be unusually well preserved; that the man who had been his family physician for at least seven years, and who had seen him go by at least once a day, had never treated him for anything except some bladder trouble and considered him in good health. Plaintiff proved that on the morning in question Fessenden was at or near No.2606 North Clark Street and appeared to be waiting for a through car, none of which came along for some time; that the morning was cold and the sidewalk was very icy and there was a slight snow upon it; that he was walking back and forth while waiting; that he slipped upon the ice and fell upon his back, and cut a gash in the back of his head; that a woman nearby, who was waiting for the same car, saw him slip and fall, went to him and found him unconscious, and put her muff under his head, and called for help, and some men came and carried him into a tailor shop and sent for his doctor; that when the young lady got her muff back it was saturated with blood, and that there was infiltration of blood underneath the skin, extending around both sides of the neck and back of the head to a very considerable extent. After Fessenden died, his body was taken to an undertaker's office not far away, and when his physician came he found the remains there. The doctor testified that this fall could have caused his death. The defense offered

the verdict of a coroner's jury, which found that Fessenden came his death "from chronic interstitial nephritis, cardiac hypertrop and arterial sclerosis." Defendant also called the coroner's physician who conducted the inquest and prepared the verdict. We think it sufficient to say of thid witness that his evidence was very greatly discredited by the testimony of the other physician and surgeons on both sides, and that the jury were warranted in finding that he either gave an incorrect account of what he found and did, or that by mistake he was describing some other autopsy which he conducted about that time. We think it unnecessary to set out in detail the contradictions of his testimony. He testified that he took out and examined the brain of deceased an found no lesion therein. We think the jury were warranted in giving no credence to that testimony. He said he returned the brain to the body, but it was not afterwards found, and therefore plaintiff could not otherwise show the condition of the brain. On December 25, 1914, a postmortem was held at the Fessenden home by three physicians. After the burial defendant demanded another postmortem and one was held, attended by physicians and experts on both sides. There was very much medical expert testimony introduced by each side. The examinations and cross examinations were very lengthy and contained many medical and surgical terms. The case has been argued here for appellant wit great force and ability., We think it would unduly extend this opinion and be of no service to any one to detail the testimony of each of these medical men in the language which they used. We think it sufficient to say that according to the testimony of the physicians called by appellant the walls of the left coronary artery were hardened and that that artery was closed

by this hardening or calcification, so that the operation of the heart ceased and the patient died because thereof, and that this condition was a disease. It seems to be the theory of the defense that Fessenden did not fall because he slipped on the ice, but because the action of his hear stopped by reason of its diseased condition. The physicians called by appellee testified that the hardening of this artery had closed it about one half, and that this would not cause death, and that the hardening of the artery of an old person is a process naturally incident to old age and is not considered a disease. There was also testimony that if Fessenden had fallen because his heart stopped beating he would not have fallen backwards but forwards or would have fallen in a heap. Appellee also had testimony tending to show that if Fessneden's heart stopped beating at that time his blood would not have been pumped out upon the muff above referred to, nor would there have been an infiltration of blood underneath the skin at the back and sides of the head, and also, that if his heart had stopped beating before he fell, he would not have continued to breathe for ten or fifteen minutes thereafter. Appellant contends that there is a fatal defect in appellee's proofs, because no physician testified positively that this fall on the ice caused Fessenden's death. We are of opinion that this excludes the inferences which the jury might reasonably draw from the proof of what did occur. We conclude that the matters here involved were questions of fact, and that there was such evidence supporting appellee's contentions that we would not be warranted in disturbing the verdict. As to evidence introduced by appellant tending to show that some other disease than hardening

of the arteries contributed to the death we think those positions are untenable.

Appellee did not call the witnesses who held the postmortem of December 25, 1914, until after the defense had put in its proo and it is argued that it was error to then admit it. We are of opinion it was competent rebuttal evidence. It is argued that it was error to permit appellee's witnesses to testify that the hardening of the arteries of an old person is an ordinary incident of old age and is not considered a disease. Appellant's witnesse had testified that it was a disease. This was competent to rebut that testimony.

It is contended that the court erred in refusing instructuo No. 22 offered by appellant. All the material portions of that instruction are contained in Nos. 15, 16, 17, and 19, given at appellant's request, and the court was not required to repeat the porposition any further. On the motion for a new trial appellant filed affidavits about certain testimony, but they are not relied upon here and therefore they do not require discussion.

We find no reversible error in the record and the judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6234

283

205 I.A. 116

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6234

gen. E.

John M. Smith, Nellie M. Clow, Nellie Anderson, Arthur E. Johnson and Anne E. Smith,

Plaintiffs in Error,

-vs-

Error to circuit cou of Rock Island county

George W. Smith, and Robert W. Ronk, Administrator with the Will annexed of John P. Smith,

efendants in Error.

Nichols, P. J.

This is a bill in equity brought in the circuit court of Rock Island county by the plaintiffs in error as heirs of John P. Smith, deceased, to set aside the last will of the deceased, which was made on the 14th day of July, 191[illegible], and by which the son of the deceased testator, George W. Smith, defendant in error, was made the sole devisee and beneficiary. The bill alleges that the deceased testator at the time of the execution of the will was mentally incapacitated; that he was of unsound mind, and that the will was made under the undue influence of his son, the defendant in error.

Issues of fact were made up to be tried, embracing the charges in the bill, and the issues were tried by a jury, and at the close of all the evidence the court directed a verdict finding that the instrument in question was the last will and testament of John P. Smith, deceased, and entered a decree to that effect, and dismissed the bill for want of equity; from which decree the plaintiffs in error are prosecuting this writ of error.

The evidence adduced on the trial shows the following facts: John P. Smith, the testator, at the time of the execution of the will in question, was a man of about 76 years of age, was illiterate, could neither read nor write, but apparently of average intelligence. He had been engaged in early manhood in rafting logs down the Mississippi river from Minnesota to Keokuk Iowa, and had also spent considerable time in Colorado in mining and prospecting for gold. He had been twice married. His first marriage occurred in 1864, in Minnesota, and he lived with his first wife until 1889 when marital troubles caused their separation, and he then filed a bill against her for a divorce. In this bill he charged her with adultery with two men, who were named in the bill. He also averred in the bill that the knowledge of his wife's infidelity had not come to him until the time of the separation, which was just before the time of filing the bill; and that he had not lived with her after he had ascertained the facts concerning her infidelity.

It does not appear that a divorce was granted upon his bill, nor whether the cause ever came to a hearing on the charges in the bill, but the evidence discloses that the wife subsequently obtained a divorce from him. And he told one of the witnesses who testified on the trial of the case, in reference to this trouble, that it cost him $1200 to get rid of his first wife. After the divorce he became married to his second wife, Anna E. Smith, who is now his widow, and one of the plaintiff's in error. He and his second wife moved to Port Byron, in Rock Island county, and located upon a small hilly farm of 33 acres, which he had purchased. The house

on the farm faced the Mississippi river, and a deep ravine ran through one part of the farm; also a creek. part of this farm was fit for cultivation, and this he rented out. Another part of the farm could be utilized for pasture, and this he used for that purpose, and pastured stock for different people There was also a garden plot connected with the dwelling house, and within its enclosure, and on this plot he raised vegetables and fruits, which he sold in and about the neighboring village. He also kept a cow or two, and raised chickens. His main occupation was attending to the business of this small farm.

After he had moved on the farm he found some rocks or quartz in the creek bed, or at the bottom of a ravine, and perhaps in some other places on the farm. These appeared to him to be like the gold bearing rock or quarts in Colorado, while prospecting and mining out there, and apparently he sent some of the samples found out to Coloado to have them assayed or analyzed and was informed that there were traces of gold in them, but not enough to pay for mining. But he got the notion from all he had seen and heard that there must be a lead or ledge of gold bearing rock or quarts on the farm, that might contain sufficient gold to make mining it a paying proposition.

He had also found some traces or out-c oppings of coal, and concluded that if he sunk a shaft he would either find gold in paying quantities, or coal. Having this idea, he worked for a number of years in sinking a shaft near the ravine on his land and in endeavoring to find this gold bearing lead or ledge, or coal. He also tunnelled into the hillside for the same purpose,

but apparently never found what he sought for, Remaining confident, however, that it was there to be found in his land. He did this work outside of his regular farm work, and does not appear to have neglected his other work on the farm, in search for gold or coal. The truck farming which he pursued, and pasturing, which was on a very limited scale, appears to have been carried on with reasonable success; this is shown to some extent by the fact that shortly before the making of the will in question he had $3600. saved up, and on deposit in the Port Byron State Bank.

Finally he had trouble also with his second wife. They quarreled about some domestic matters, and she left him. He said to one of the witnesses in the case,-"The darned old woman was so mean she got mad and left, and I'm glad of it; not I'm all alone." The last marital troubles of the testator were adjusted by a settlement made between him and his second wife, on July 7, 1913, about a week before he made his will, and about 5 months before his death; the parties came to an agreement to live separately, and he paid her $2500. which she accepted in satisfaction of her claims upon him. She then joined him in a deed by which he conveyed the farm in question to his son, George, the defendant in error.

After the separation from his first wife, and the divorce which followed it, he does not appear to have had any further communication with her; nor did he manifest any interest in any of the children of his first wife except George, of whom he appeared to be fond. George was the only one of the childreh of the first marriage who ever came to visit the testator, and George

visited his father at Port Byron shortly before the making of the will in question, and was there about the time of the settlement which was made with the second wife, but was not at Port Byron nor present at the time the will in controversy was executed. The testator made the will in question a week after the settlement with his second wife; and made his son, George, the sole legatee of his estate, which at that time consisted only of about $1100- the money remaining after paying his second wife the amount due her on the settlement.

About three months after the execution of the will, the testator became ill; had a fever, which developed into a delirium and symptoms of senile dementia became evident, and he was taken to the hospital for the insane at Watertown, where he died December 14, 1913.

On the trial the defendants in error, who are the proponents of the will here contested, made proof of its execution by the testator, by the attesting witnesses, and established the fact that the formalities required by law in the execution of the will were all complied with. The proof shows that the will was made in the Bank at Port Byron, where the testator had been in the habit of transacting his banking business. No one went with him to the bank when he had the will drawn. The attesting witnesses to the will were the cashier of the bank, and a merchant whose place of business was near by, and who was called in to witness the will. Both the witnesses testified to the proper execution of the will, and that the testator was of sound mind at the time.

The proponents thereupon called eleven other non-expert witnesses from among the friends and neighbors of the testator, who had been more or less intimate with him while he resided on his farm, and some of these had transacted business with him. They testified to the peculiarities of the deceased, and concerning his conversations, the dealings they had with him, his narrations at different times, of the logging experiences he had as a riverman; also many of the incidents which occurred while he was prospecting for gold in Colorado; also often told about his belief that there was gold bearing quarts, or a ledge containing the same, in the farm, which some day would become quite valuable. He also relatedto them his marital troubles, both concerning his first wife, and his second wife. All these witnesses testified that they never perceived anything in the peculiarities of the deceased, or in his conversation, or manner, or conduct, that indicated insanity, and that in their opinion he was of sound mind.

The contestants called nine non-expert witnesses, who also resided in the neighborhood of this farm, and some of whom had business dealings with the testator, and some of them some misunderstandings about different small matters. These witnesses, on practically the same facts concerning the peculiarities of the deceased, and his manner and conduct and conversation testified that in their opinion he was not of sound mind. And the contestants thereupon called four expert witnesses- Doctors Thomas F. Neal, who is connected asa physician with the Waterman State Hospital; A.R.Williams, at one time assistant physician in the Illinois State Hospital at Kankakee; C. Eyster, physician

and surgeon in Rock Island; and C. C. Atherson, also connected with the Watertown hospital. Theses experts testified that the deceased, at the time he wasconfined in the hospital for the insane at Watertown in November, was afflicted with senile dementia; that his mind was insound at that time; that ~~saidx~~ senile dementia is a slow progressive disease and in their opinion he was afflicted therewith in the month of July when he made his last will, and that his mind was presumably unsound at that time. This embraces substantially all the evidence in th case.

It is claimed by the plaintiffs in error that the unsoun ness of mind in the testator was manifested by his search for gold or coal on his farm; that his belief that gold could be found, and found in paying quantities, and was a delusion resulting from an unsound state of his mind. A delusion has been repeatedly defined by the courts; one of the leading cases on this point is Potter v Jones, 20 Ore. 239. The supreme court of Oregon gives this defibiti on of a delusion; " A conception that originates spontaneously in the mind, without evidence of any kind to support it, and which can be accounted for on no reasonable hypothesis, having no foundation in realit Another definition of equal clearness is given in Middleditch v Williams, 45 New Jersey Eq., 726, namely: " If without evidence of any kind the testator imagines or conceives something to exist which does not exist in fact, and which no rational person would in the absence of evidence believe to exist, he is afflicted with an insane delusion." These definitions were approved and adopted by our supreme court in Owen v Crumbaugh, 128 Ill. 380.

It is clear from the foregoing definitions that a delusion is not a deduction from facts, however defective or inconclusive they may be, but something purely imaginative, a figment of the brain. The evidence in this case shows that the notions which the testator had concerning the probability of gold or coal being found in his land were not purely imaginative or figments of the brain, but were conclusions which he drew from realities of facts, though perhaps based upon insufficiant or inconclusive facts; and a person of more intelligence or of better judgment might have thought the teestator's ideas about the finding of gold and coal ridiculous, yet the fact remains that there was some evidence to support them, and that they were conclusions and not delusions.

Nor is there anything in the evidence to sustain the contention that the ideas, which he entertained concerning the infidelity of his first wife, were delusions. It is clear that his notions concerning these matters were also apparently based on some sort of evidence, however insufficient it may have been. This appears from the bill itself, which he filed for divorce, in which he charges his wife not only with having committed adultery, but gives the names of the men with whom she committed such adultery. His conduct with reference to the matter seems to have been about the same as the conduct of any other complainant would have been. He avers in the bill that the knowledge of his wife's infidelity did not come to him until Setpember 2,1889 and that he did not live with her after that. He told the witness, Frank O'Hara, when he was living at Port Byron, that he thought his first wife was not faithful, and also found fault

because at one time he brought $200. home off the river when he was rafting and that he went to her after that and wanted some of the money and that all that there was in the house was $20. He said there were four children, but he did not claim any of them as his but George. He also told him that at one time he was at a school house where they had a Grange and somebody informed him that there was a man in his house, and he went there with a club- made up his mind that he was going to kill him, and he found the man was bigger than he was and then he made up his mind to get a shot-gun and he went over to the neighbor's to get the shot-gun and when he came back the man was gone. He told another withess, Harry Nicholson, referred to the marital troubles, with his first wife, that he had raised a family in Minnesota, and that he and his first wife parted and she was not true to him; that at one time she went away and he followed her to a hotel in Wisconsin.

It is apparent that the suspicion concerning his first wife's fidelity arose from incidents which actually occurred or matters of information; at any rate they were based on realities, a natural, though perhaps an insufficient basis for them, and it follows, therefore, that the notions which he had concerning the matter were not delusions. " Belief which results from a process of reasoning from evidence, however, imperfect the process may be, or illogical the conclusion, is not an insane delusion. An insane delusion is not established when the court is able to unde stand how a person situated as the testator was might have believed all that the evidence shows that he did believe, and still have been in full possession

of his senses. Thus, where the testator had actual grounds for suspicion of the existence of something in which he believes, though in fact not well founded, and disbelieved by others, an misapprehension of the fact is not a matter of delusion which will invalidate his will. (Owen v Orumbaugh, 223 Ill. 330; Stackhouse v Horton, 15 N.J.Eq. 202; Potter v Jones, 20 Ore. 239; Mullins v Wottrell, 41 Miss. 291; Tait v Westfall, 161 Ind. 648.) There is no evidence in the record which indicate that the testator's charges which he made against his first wife were without rational basis, or that he had no reasonable grounds for believing them; apparently he acted as the average man would act under like circumstances with reference to these marital troubles. When he discovered what he considered sufficient evidence of his wife's infidelity, he separated from her and sued for divorce, stating definitely the charges upon which he asked the divorce, and the fact that the divorce was not granted or that the evidence was insufficient to sustain the charges would not change the charges made into delusions. If it were a mania, that had afflicted him, and caused him to believe in conjugal infidelity, it is likely and natural that he would been possessed of the same mania in his second marriage, but the troubles with his second wife were of an entirely different character, and it does not appear that he ever had the slightest suspision concerning her fidelity. We are of opinion that the matters upon which plaintiffs in error base their contention that the testator had delusions do not justify the inference that they resulted from unsoundness of mind.

In the contest of a will upon the question of testamentary capacity, the law throws the burden of proving the sanity of the testator, in the first instance, on the proponents; but after a prima facie case has been made out by the testimony of the subscribing witnesses, the legal presumption is in favor of sanity; and the burden of the whole case rests upon the contestants. (Huggins v Drury, 192 Ill. 528; Wilbur v Wilbur, 129 Ill. 392; Carpenter v Calvert, 83 Ill. 62; Taylor v Pegram, 151 Ill. 106; Craig v Southard, 162 Ill. 209; Egbers v Egbers, 177 Ill. 82; Entwistle v Michael, 180 Ill. 9; Wilkinson v Service, 249 Ill. 146 Norton V Clark, 253 Ill. 557) While it is true that the expert witnesses testified in November 1913, the testator had senile dementia and expressed the opinion that he was afflicted in this way as far back as the previous July, yet they do not testify that the senile dementia which he may have had in July was of such a character as to affect his testamentary capacity. Senile dementi is a weakening condition of the mind and results from old age, it brings about a diminution of the mental faculties, but it does not necessarily result in mental incapacity to make a will. Graham v Deuterman, 244 Ill. 124. The evidence of theproponents of the will conclusively shows that the testator had mental capacity to m a will. The contestants adduced no evidence which shows or from which the inference could reasonbly be drawn that if the testator had senile dementia in July it impaired his mind to such an extent as to affect his testamentary capacity. This evidence being wholly lacking, as well as any evidence of undue influence, the court properly directed a verdict for defendants in error. The decree dismissing the bill is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2832

205 I.A. 118

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6333

The People of the State of Illinois.

Defendant in error.

vs Error to Co. Ct. Boone.

Frank Barney,

Plaintiff in error.

Nichaus, P. J.

In this case, an information containing ten counts, was filed in the county court of Boone County, during the March term, 1916, charging the plaintiff in error, Frank Barney, with having made illegal sales of intoxicating liquor in anti-saloon territory, and containing also an eleventh count, which charges that the place of business of the defendant, wherein the intoxicating liquors were illegally sold, is a nuisance. To this information, the plaintiff in error entered a plea of not guilty and a jury trial was had, which resulted in a verdict finding the plaintiff in error guilty on the tenth and eleventh counts of the information.

The plaintiff in error made a motion for a new trial, and in arrest of judgment, which were overruled, and the court thereupon sentenced him to pay a fine of $100. on each of the counts upon which he had been found guilty; also to confinement in the County Jail for a period of thirty days, as a part of the punishment under the tenth count; and for a period of fifty days as a part of the punishment under the "nuisance" count; making a total of eighty days imprisonment.

The court also ordered that in case the fine and costs were not paid, at the expiration of the jail sentence, that the defendant pay the fine and costs by imprisonment in the County Jail, at the rate of $1.50 per day; and that the place described in the eleventh count, Number 139 North State Street in Belvidere

Gen. No. 6320

The People of the State of Illinois.

Defendant in error.

vs. Error to Co. Ct. Peoria.

Frank Barney,

Plaintiff in error.

Michaels, P. J.

In this case, an information containing ten counts, was filed in the county court of Knox County, during the March tion, 1913, charging the plaintiff in error, Frank Barney, with having made illegal sales of intoxicating liquor in anti-saloon territory, and containing also an eleventh count, which charges that the place of business of the defendant, wherein the intoxicating liquors were illegally sold, is a nuisance. To this information, the plaintiff in error entered a plea of not guilty and a jury trial was had, which resulted in a verdict finding the plaintiff in error guilty on the tenth and eleventh counts of the information.

The plaintiff in error made a motion for a new trial, and in arrest of judgment, which were overruled and the court thereupon sentenced him to pay a fine of $100. on each of the counts upon which he had been found guilty; also to confinement in the County Jail for a period of thirty days, as a part of the punishment under the tenth count; and for a period of fifty days as a part of the punishment under the "nuisance" count; making a total of eighty days imprisonment.

The court also ordered that in case the fine and costs were not paid, at the expiration of the jail sentence, that the defendant pay the fine and costs by imprisonment in the County Jail, at the rate of $1.00 per day; and that the writs issued in the eleventh count, under the North Peoria Street Im-Delivered

Illinois, be declared a nuisance, and as such be abated by the sheriff, unless bond be given in accordance with the statute.

It is contended by the plaintiff in error, that the verdict is not based upon sufficiently reliable evidence, to sustain a conviction in a criminal case; and we are of opinion that this contention should be sustained.

There were four witnesses adduced upon the trial, upon whose testimony the People relied to show the guilt of the plaintiff in error, of ~~xxxx~~ the charges preferred against him in the information. These were Michael Gormley, Charlie Ott, and two police officers of the City of Belvidere, -namely, Edward J. Haack and Charles Kingren. Charlie Ott testified, that he bought liquor, about the month of February, 1916, in Barney's place of one Jack Loveridge, and paid him fifty cents therefor. It is conceded by counsel for the defendants in error, that the plaintiff in error is not sufficiently connected with this alleged sale by Loveridge, to sustain a conviction, so it is needless to discuss this phase of the case.

The witness Gormley testified, that he bought two pints of whiskey from Barney, on the premises in question; but he was impeached by his own testimony which he gave upon the trial of the plaintiff in error upon a similar charge before a Justice of the Peace in the city of Belvidere, on April 3rd. 1916 wherein he stated that he had not been in Barney's place during the year 1916, and had not obtained any whiskey or intoxicating liquor whatever in of Barney at any time. His testimony given before the Justice of the Peace, was in accord with the testimony of the plaintiff in error, who denied that he ever sold any liquor to the witness.

The two police officers testified, that they purchased some beer in the place of the plaintiff in error, after September

peek in the place of the plaintiff in error, after September
The two police officers testified, that they purchased none
any liquor of the witness.
timony of the plaintiff in error, was plainly that he ever sold
before the Justice of the Peace, was in accord with the tes-
liquor whatever in or nearby at any time. The testimony given
the law, and not obtained only falsely or intoxicating
wherein he stated that he had not been in Barney's place during
of the Peace in the city of Salina, on March 21st, 1899,
the plaintiff in error upon a similar charge before a Justice
impeached by his own testimony which he gave when the trial of
of making from Barney, on the previous day, and was
meaningless to discuss this phase of the case.
The written Journal entries, that is, only the plain-
alleged acts by Constable, to sustain a conviction, so it is
the plaintiff in error is not sufficiently connected with this
It is noted by counsel for the defendants in error, that
of one Jack Doolittle, and paid him fifty cents therefor.
Liquor, about the month of January, 1899, in Barney's place
Emma and Charles Klugman. Charlie Ott testified, that he bought
police officers of the City of Salina, - namely, Theard &
information. I see here Richard Barney, Charlie Ott, and the
in error, of xxxx the owners proprietary interest in the
testimony & Justice relied to show the guilt of the plaintiff
There were four witnesses sworn on the trial, upon whose
conviction in a criminal case; but as it is of opinion that this
conviction should be sustained.
It is contended by the plaintiff in error, that the verdict
is not based upon sufficiently reliable evidence, as counsel &
sheriff, whose word is given in accordance with the statute.
Illinois, he received a pardon, and it will be stated by the

8, 1915, the date upon which a previous information had been filed against the plaintiff in error, for illegally selling intoxicating liquors, upon which he was tried and convicted, in the Circuit Court of Lake County, on October 13, 1915. It was shown on that trial that both of the officers testified positively, that the last time they were in the Barney place was during Fair week, on Saturday, September 4, 1915; and it clearly appears from their testimony, that they must have been mistaken, in saying that they had purchased and drank beer there after September 8, 1915.

We are of opinion, therefore, that the testimony of the witnesses which is relied upon to sustain the conviction of the plaintiff in error, of the offenses charged, does not show his guilt beyond a reasonable doubt.

The record also discloses the fact, that the right of cross examination to which a defendant in a criminal case is entitled , was unduly abridged. The plaintiff in error was entitled to a broader latitude in cross examination, concerning matters bearing upon the credibility of some of the witnesses who testified. It is prejudicial error to unduly abridge this right. (Sutton v People, 119 Ill. 254; People v Cochringer, 196 Ill. App. 473.)

For the reasons stated, the judgment of conviction is reversed and the cause remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2833

205 I.A. 119

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6337.

Joseph Pedroni, appellee.

vs Appeal from Bureau.

Illinois Third Vein Coal

Company, appellant.

Niehaus, P. J.

This suit was brought in the circuit court of Bureau County by the appellee, Joseph Pedroni, against the Third Vein Coal Company, appellant, for damages alleged to have been sustained by him on account of injuries he suffered while in appellant's employ as a coal miner. The grounds for recovery stated in the declaration, are, that the appellant was guilty of a wilful violation of the Statute requiring the cages used in the shafts for hoisting and lowering workmen, into the coal mine, to be furnished with a sheet metal cover. It also is charged, that the cover of the cage in the shaft of appellant's mine, had an opening or hole left in it, which was provided with a metal door, which when opened was liable to fall suddenly and forcibly down, when the cage ascended; and that because of this opening or hole in the cover, workmen who were being hoisted and who were wont to grasp for a hand-hold in the cage, were in danger that this door falling down would catch and crush their fingers; and that the door was therefore an improper device, which imperiled the safety of the workmen in being hoisted to the top in the course of their employment.

The proof shows that the appellant is operating a coal mine at Ladd, in Bureau County; and that the hoisting shaft in the mine is about 468 feet deep; and composed of two compartments, separated by a partition; each compartment being four and one half feet wide, by six and one half feet long; the cages fitting in these compartments, were used in hoisting and lowering the

Gen. No. 8337.

Joseph Petroni, appellee.

vs. Appeal from Bureau.

Illinois Third Vein Coal Company, appellant.

Mr. Justice Phillips delivered the opinion of the court.

This suit was brought in the circuit court of Bureau County by the appellee, Joseph Petroni, against the Third Vein Coal Company, appellant, for damages alleged to have been sustained by him on account of injuries he suffered while in appellant's employ as a coal miner. The grounds for recovery stated in the declaration, are, that the appellant was guilty of a wilful violation of the statute requiring the cages used in the shafts for hoisting and lowering workmen, into the coal mine, to be furnished with a sheet metal cover. It also is charged, that the cover of the cage in the shaft of appellant's mine, had an opening or hole left in it, which was provided with a metal door, which when opened was liable to fall suddenly and forcibly down, when the cage ascended; and that because of this opening or hole in the cover, workmen who were being hoisted and who were wont to grasp for a hand-hold in the cage, were in danger that this door falling down would catch and crush their fingers; and that the door was therefore an improper device, which imperilled the safety of the workmen in being hoisted to the top in the course of their employment.

The proof shows that the appellant is operating a coal mine at Leal, in Bureau County; and that its hoisting shaft in the mine is about 488 feet deep; and composed of two compartments, separated by a partition; each compartment being four and one half feet wide, by six and one half feet long; the cages fitting in these compartments, were used in hoisting and lowering the

miners who were employed in the operation of the mine. The roofs or coverings of these cages, which were a little over six feet from the floor of the cages, were composed of boiler iron, about one sixteenth of an inch thick, and that they had an opening, about twenty inches wide by twenty nine inches in length. These openings were specially made and used in taking long timbers or rails into the mine, which could not be taken in except by standing them upon end in the cage. These openings in the cage were closed by means of doors, which were also made of boiler iron material; the doors were on hinges, and attached to the edges of the openings. There were provided two places for hand-holds for the workmen, one near each end of the cages. These hand-holds consisted of an iron rod extending across the ends, about three inches from the top. The cages are large enough to hoist twelve men at a time.

There appears to be no contest about the manner in which appellee was injured. Having finished his work in the mine, appellee came to the shaft to be hoisted to the top; and as he approached the shaft, he was told by the cager, who was in charge of the movements of the cage, to hurry up if he wanted to get on the cage and he did so. Immediately upon his getting into the cage, it started upward. The door intended to cover the opening in the top of the cage, was standing up on its hinges; and when appellee hurriedly got into the cage, he reached up for a hand-hold, to steady himself, and happened to grasp the edge of the openplace in the roof of the cage, for a hand-hold; and as he did so, the door fell down on the opening and on the metal edge which appellee had grabbed hold of, and thereby crushed three of appellee's fingers; and the injury was quite severe. The physician and surgeon who attended appellee testified that the bones of the middle and third fingers were

miners who were employed in the operation of the mine.

The tools or coverings of these cages, which were a little over six feet from the floor of the cages, were composed of boiler iron, about one sixteenth of an inch thick, and that they had an opening, about twenty inches wide by twenty nine inches in length. These openings were specially made and used in taking long timbers or rails into the mine, which could not be taken in except by standing them upon end in the cage. These openings in the cage were closed by means of doors, which were also made of boiler iron material; the doors were on hinges, and attached to the edges of the openings. There were provided two pieces of hard-wood for the workmen, one near each end of the cages. These hard-wood pieces consisted of an iron rod extending across the ends, about three inches from the top. The cages are large enough to hoist twelve men at a time.

There appears to be no contest about the manner in which Appelles was injured. Before finishing his work in the mine, Appelles came to the shaft to be hoisted to the top; and as he approached the shaft, he was told by the owner, who was in charge of the movements of the cage, to hurry up if he wanted to get on the cage and be hoisted. Immediately upon his getting into the cage, it started upward. The door intended to cover the opening in the top of the cage, was standing up on the hinges; and when Appelles partially got into the cage, he reached up for a hand-hold, to steady himself, and fastened to grasp the edge of the overplace in the roof of the cage, for a hand-hold; and as he did so, the door fell down on the opening and on the metal edge which Appelles had grasped hold of, and thereby crushed three of Appelles's fingers; and the injury was quite severe. The physician and surgeon who attended Appelles testified that the bones of the middle and third fingers were

broken, and the soft tissues peeled off of the joints; and the extension tendons were severed; and the little finger was smashed, the nerves and soft tissues being all in a pulp.

There was a trial by a jury, and the jury returned a verdict finding appellant guilty, and assessing appellee's damages at $500. Appellant thereupon made a motion for a new trial, which was overruled by the Court; and judgment was entered on the verdict; and from this judgment an appeal is prosecuted.

Appellant contends, that the statute which requires a covering on the top of the cage, was not violated, because the cage was adequate to protect persons riding therein, from falling objects which it insists was the only purpose of the cover; but that even if the Statute was violated, the appellee has no right to recover, because he was not injured by a falling object.

The language of the Statute does not indicate that its sole purpose is to protect miners who ride in cages, from falling objects. The language used, concerning the protection of the miners from falling objects, is used in connection with the requirement of the adequacy of the cover; it indicates that it was in the contemplation of the lawmaking power, to make the protection of the persons from falling objects, the test of the adequacy of the metal covering, rather than its sole purpose and the obvious meaning of the statute is, not only that the cages shall be equipped with metal covers, but also that such covers shall be in use as such, when the cages are operated for hoisting the miners. Statutes are to be construed with reference to the purposes for which they are enacted. The purpose in providing a cover for the cages, clearly had reference to their use as a protection, in hoisting and lowering persons employed in the mine. Merely to attach a cover to a cage, and not have it in use as a cover, would not be any protection to persons in the cage, and hence would not attain the object

broken, and the soft tissues beneath all of the joints; and the swashed, the nerves and soft tissues twisted in a knot. extension tensions were severed; and the little finger was

There was a trial by a jury, and the jury returned a verdict finding a negligent quality, and assessing plaintiff's damages at $500. Appellant thereupon made a motion for a new trial, which was overruled by the Court; and judgment was entered on the verdict; and from this judgment an appeal is prosecuted.

Appellant contends, that the statute which requires a covering on the top of the cage, was not violated, because the cage was adequate to protect persons riding thereon, from falling objects when it inside was the only purpose of the cover; but that even if the Statute was violated, the appellee has no right to recover, because he was not injured by a falling object.

The language of the Statute does not indicate that its sole purpose is to protect miners who ride in cages, from falling objects. The language used, concerning the protection of the miners from falling objects, is used in connection with the requirement of the adequacy of the cover; it indicates that it was in the contemplation of the lawmaking power, to make the protection of the persons from falling objects, the test of the adequacy of the metal covering, rather than its sole purpose and the obvious meaning of the statute is, not only that the ~~xxxxx~~ shall be equipped with metal covers, but also that such covers shall be in use at such, when the cages are operated for hoisting the miners. Statutes are to be construed with reference to the purposes for which they are enacted. The purpose in providing a cover for the cages, clearly had reference to their use as a protection, in hoisting and lowering persons in the cage, and these would not attain the object not have it in use as a cover, would not be any protection to employed in the mine. Merely to attach a cover to a cage, and

of the Statute; and therefore would not be a compliance with its requirements.

The evidence in this case is undisputed, that at the time of the injury, the cage in question was in use for the purpose of hoisting miners and employes of appellant; and that, at that time, it had a large opening in the top of the cage; and that while appellant had a cover for this opening, it was not in use as a cover at that time. The cage was, therefore not in the condition in which the Statute contemplates it should be, and so in effect the Statute was violated.

Objection was made by appellant to the seventh and eighth instructions; and these instructions are subject to the criticism that they allow the jury to find for appellee, if the injury to the appellee was caused by any lack of care, or negligence, on the part of appellant, in providing a safe cage for appellee to ride in, without limiting the lack of care or the negligence in that regard, to the negligence charged in the declaration. But inasmuch as there was no other carelessness or negligence than that, established by the evidence; no other carelessness or negligence could have come into the contemplation of the jury in considering the evidence. While these instructions were technically erroneous, this could not have harmed appellant, and no reversible error was committed.

We are of the opinion that the instructions 42, 43 and 44 were properly refused. Refused Instruction No. 44 is objectionable, because it tells the jury, that they must make their finding under their oaths concerning a certain feature of the case. It is not proper to designate any particular feature of a case specially in this way that way. This instruction not only had a tendency to mislead the jury into the belief, that some special importance was attached to the particular feature put

of the Statute; and therefore would not be a compliance with its requirements.

The evidence in this case is undisputed, that at the time of the injury, the cage in question was in use for the purpose of hoisting miners and employes out of the mine; and that, at that time, it had a large opening in the top of the cage; and that while equipment had a cover for this opening, it was not in use as a cover at that time. The cage was, therefore not in the condition in which the Statute contemplates it should be, and so in effect the Statute was violated.

Objection was made by appellant to the seventh and eighth instructions; and these instructions are subject to the criticism that they allow the jury to find for appellee, if the injury to the appellee was caused by any lack of care, or negligence, on the part of appellant, in providing a safe cage for appellee to ride in, without limiting the lack of care or negligence in that regard, to the negligence charged in the declaration. But inasmuch as there was no other carelessness or negligence than that, established by the evidence; no other carelessness or negligence could have come into the contemplation of the jury in considering the evidence. While these instructions were technically erroneous, this could not have harmed appellant, and no reversible error was committed.

We are of the opinion that the instructions Nos. 43 and 44 were properly refused. Refused Instruction No. 44 is objectionable, because it tells the jury, that they must make their finding under their oaths concerning a certain feature of the case. It is not proper to instruct upon any particular feature of a case especially in such way that may. This instruction not only had a tendency to mislead the jury into the belief, that some special importance was attached to the particular feature put

before them, and gave it undue prominence; but might also have given them to understand, that the cause of appellees injury was a matter shrouded in doubt, when as a matter of fact the cause of appellee's injury was not in dispute.

Refusedx instruction No. 43 is objectionable, because it practically directs a verdict for the appellant, in case they find, that the injury was not caused by a falling object; thus unduly limiting the right of recovery for injuries resulting from a wilful violation of the Statute; and also ignoring appellee's right to recover if there was sufficient evidence under the counts charging common law negligence.

Refused instruction No. 44 is subject to the objection that it leaves the jury to determine whether, under the evidence, there was a violation of the Statute, as a matter of law.

We are of opinion, that the injury suffered by the appellee was sufficiently severe in its character, as to justify a verdict for the amount of damages which the jury assessed. There is no reversible error in the record; and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6345

2836

205 I.A. 142

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6345.

Lz. Medearis, appellant.

vs Appeal from Marshall.

Michael Balenseifen, appellee.

Nichaus, P. J.

Lz. Medearis, the appellant commenced this suit in assumpsit before a justice of the peace in Marshall County, to recover the sum of $200. which he claimed the appellee, Michael Balenseifen, agreed to pay him for rebuilding a dam on a part of the farm owned by the appellee, and which the appellant had leased from him. The Balenseifen farm is situated close to the Illinois River; and is a part of the lowland along the river which is subject to overflow. There is about 80 acres of low land on this farm; and it is subject to overflow by a creek that ran along the northerly part of the farm. To prevent the waters of the creek from overrunning a portion of the farm which could be cultivated, the appellee Balenseifen had, about twelve years prior to the time in question, constructed a dam, by means of which the waters of the creek were diverted away from this part of the farm; but the dam had been repeatedly washed out, wholly or in part. About the time of the leasing of the farm by the appellee to the appellant, the dam had several large openings in it, which had been caused by a wash out.

After the lease had been made between the parties, appellant cleared some of the low land, below the creek bed, and it was agreed between the parties, that the appellant should have the entire crops which he could raise on this cleared portion of the land, during the lifetime of the lease; and a provision was added to the lease to that effect, by the parties.

In this case there was a trial by jury, which resulted in a verdict for the appellee. The appellant thereupon made a motion

Jan. 24, 1942.

Le. Waterville, Applicant.

vs Appeal from Township II.

Mahonsi Delaware, Appellee.

Mitchie, P. J.

Le. Waterville, the plaintiff-appellant this suit in ejectment
before a justice of the peace in Campbell County, to recover
the sum of $500. which he claimed the appellee, Mahonsi
Delaware, agreed to pay him for relinquishing his claim to a
part of the farm owned by the appellee, but which the appellant
had leased from him. The Delawarites then in alliance close to
the Illinois River; one is a part of the lowland along the
river which is subject to overflow. There is about 80 acres of
low land on this farm; and it is subject to inundation by a creek
that runs along the northerly part of the farm. In leaving the
waters of the creek from overflowing a portion of the high ridge
consti ly undrained, the appellee Delawarites had, about twelve
years prior to the time in question, constructed a dam, by
means of which the waters of the creek were diverted away from
this part of the farm; but the dam became gradually worn
out, partly or in part. About the time it the leasing of the
farm by the appellee to the appellant. The dam had created there
openings in it, which had been caused by a wash out.

After the lease had been made between the parties, appellant
cleared some of the low land, broke the ground, and it
was stated to the jurors to that effect, by the parties.
In this case there was a trial by jury, which resulted in a
verdict for the appellee. The appellant thereupon made a motion

for a new trial, urging as one of the reasons for granting a new trial, newly discovered evidence; and the newly discovered evidence was set forth in an affidavit. The court denied the motion for a new trial, and rendered judgment against the appellant for costs; from which judgment the appellant prosecutes this appeal.

It is the contention of the appellant, that the verdict is against the weight of the evidence; that a new trial should have been granted because of the alleged newly discovered evidence; that improper evidence was brought to the attention of the jury; and that his rights were prejudiced by improper conduct of counsel in the trial.

The appellant testified to a definite understanding with the appellee, for the reconstruction and repair of the dam in question and that the appellee agreed to pay him $300 for the work to be done. As to the terms of this definite and fixed agreement there were but two witnesses, - the appellant on the one hand asserting that the agreement was made; and the appellee on the other hand, denying that such agreement had been made. Then there were other witnesses, who were, with one exception, members of appellant's household, and his relatives, who testified to matters which tended to corroborate the appellant in his version of the matter; who testified that on different occasions they had heard the appellee say, that he would give $200. to have the dam repaired or reconstructed. The appellees version of the controversy was to the effect, that the appellant had rebuilt this dam for his own benefit; and for the purpose of protecting the land, which he had cleared, from which he was entitled to retain all the crops that it yielded. This version was apparently corroborated by two witnesses who testified, that the appellant had told them, on different occasions, that

he was building the dam for the purpose of protecting the crops that he was raising on the land for himself.

Numerically, there appears to be a preponderance of the evidence in favor of the appellant: but the weight of the evidence does not necessarily depend on the number of witnesses; but the matter of the credibility of the witnesses is also ~~xxxxxx~~ involved. What witnesses were more credible, or more worthy of belief, was for the jury to determine; and they are in the best position to determine the matter, from seeing the witnesses and hearing them testify; and observing their demeanor and conduct while testifying. It is evident from the verdict, that the jury came to the conclusion, that the appellee, and the witnesses who corroborated him in his version of the controversy, were the more worthy of belief. Under these circumstances, this court is not in a position to say, that the jury should have found differently; or that they should have considered the testimony of appellant and the witnesses for appellant, because of the larger number, as carrying the greater weight of the evidence; nor can the verdict, under these circumstances, be considered as so manifestly against the weight of the evidence, that it should be set aside by a Court of review.

Where there is a contrariety of evidence in both sides, and the facts and circumstances, by fair and reasonable intendment will warrant the inferences of the jury, a Court of review will rarely, if ever, disturb a verdict, notwithstanding the fact that it may appear to be against the weight of the testimony, so far as the number of witnesses are concerned. (McInery v Tri-City Ry. Co. 179 Ill. App. 152- Schneeweiss v Ill. Cent. R. R. Co. 196 Ill. App. 182. Can. Meter v Lambert, 104 Ill. App. 248; North Chicago St. Ry. Co. v Kaspers, 85 Ill. App. 316 affirmed in 186 Ill. 246; West Chicago St. R. R. Co. v Levy, 82 Ill. App. 302.)

Counsel for appellant also complain, that incompetent evidence was admitted upon cross examination; especially with reference to an assault alleged to have been made by the appellant, upon the wife of appellee; and that admission of this evidence was prejudicial; also the evidence concerning the relations between the appellant and his housekeeper. The record discloses however, that the evidence concerning the alleged assault on the wife of appellee, was admitted without any objection on the part of appellant; and appellant is therefore not in position to assign error on its admissibility; and the record does not disclose any improper questions concerning the relations between the appellant and his housekeeper.

If counsel for appellee was guilty of improper conduct during the trial and argument of the case, it does not appear in the record; and we are therefore unable to determine what the conduct of counsel was; but we are bound to assume. that the conduct of counsel was not improper; and that if it had been improper, there would have been a record made of it.

Appellant was not entitled to a new trial on the ground of newly discovered evidence. It appears, that the witness by whom the appellant could prove what he alleges as newly discovered evidence, was present at the trial, and was a witness for appellant concerning some matter other than those set forth in the affidavit; but that appellant was not aware of the fact that he had such knowledge, and therefore alleges it to be newly discovered evidence. But no reason is apparent why appellant, by the exercise of proper diligence, could not have ascertained at and before that time, and before the trial was ended, all that the witness knew about the matters involved in the trial; and have gotten them in evidence. Moreover, the newly discovered evidence is cumulative. It is not error to refuse to grant a new trial on the ground of newly discovered

evidence, where it appears that there is a lack of diligence in discovering the evidence; or where the evidence is merely cumulative. (Gerdes v Niemeyer, 193 Ill. App. 574; Miksonis v Hyde Park Hotel Co. 178 Ill. App. 503; Sexton v Drake, 191 Ill App. 328; O'Malley v Ill. Pub. and Printing Co. 194 Ill. App 544;Freudenberg v Brown, 175 Ill. App. 588; Rybarezyk v Same 189 Ill. A p. 589.)

The record does not disclose any reversible error; and the mudgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6501

287

205 I.A. 1

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 11 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6251. Gen. No.

Anton Krayouska,
Appellee,

-vs-

Spring Valley Coal
Company,
Appellant.

Appeal from the city court
of Spring Valley.

Nichaus, P. J.

This is an action on the case to recover damages for personal injuries suffered by the appellee, Anton Krayouska, while in the employ of the appellant, Spring Valley Coal Company, as a coal miner. The case was brought in the city court of Spring Valley, and a jury trial resulted in a verdict for appellee who recovered $800.00 damages. Appellant made a motion for a new trial, which was overruled by the court, and judgment against the appellant was entered on the verdict. An appeal is prosecuted from this judgment.

The declaration upon which the case was submitted to the jury consists of an original count, and four additional counts. The original count avers that the appellant was operating a coal mine, consisting of surface workings covering several acres of land, and underground workings driven into the earth 400 feet deep to a view of coal; that there is a main shaft, and from the bottom of the main shaft divers rooms and passage-ways have been driven and constructed horizontally through the earth to the places where the coal still remains unmined; that tracks

are laid along all of the underground road-ways for cars to travel on; that all the cars had metal wheels to fit the rails of the railroad track; and that at the time of the injury the mine was operated under the general supervision of an officer of appellant called the mine manager, and divers assistant managers whose orders and instructions all persons at work had to obey; that appellee was a duly qualified miner, authorized to work in the mine, under the laws of the state, and was at work as a miner; and that there were then at work undergorund in divers capacities about 250 men; that it was the duty of the appellant's at that time to allow no person to enter the mine and work there, or to remain at work there, except under the direction of the mine manager, before all conditions had been made safe; that nevertheless, on the day in question the appellant wrongfully allowed the appellee to enter the mine to work therein as a miner, not under the direction of the mine manager, and before all conditions had been made safe; and while unsafe or defective conditions existed in and along the railroad tracks and roadways aforesaid, to which appellee was exposed while at work, and in passing and traveling along the railroad track and road; and that the appellee, while in the line of his duty, was passing along the railroad tracks and road at a certain place exposed to the conditions and dangers aforesaid, he was then and there struck and knocked down by an empty car, the conditions and dangers aforesaid being unknown to him, whereby his person, body, hands and limbs were hurt, wounded and injured, and he was damaged; and that appellee's injuries and damages were occasioned wholly or in part because the appellant wilfully failed to comply with the law aforesaid.

The first additional count alleges that the appellant had rejected the provisions of the act known as the "Workmen's Compensation Act", of 191-, and that on the day of the injury the appellee was a duly qualified miner, and at work as a miner in a certain room or working place known as the second room off of the second left entry off the sixth right entry, and that there were at work in the mine about 40 men; that on the day in question the appellee had left the room in which he was working for the purpose of getting a car, which was standing in the main entry-way, and to bring it into his room that he might load it with coal; and that it was the duty of the appellant to use reasonable care to furnish the appellee with a reasonably safe place in which to work, and not to expose him to unnecessary dangers; and particularly not to suffer or permit any other car or cars under the charge and control of divers agents of the appellant to run upon or strike against the appellee; and that at the point where the car mentioned was standing, which the appellee was about to take to his working place, in the main entry, there was a hill or incline in the track to a point approximately 60 or 70 feet north thereof, and that from this point the track sloped downward to about the place where said appellee was working; and that while he was attempting to push this car from the entry-way into his room, a certain other car which was then and there under the control of certain other servants of the appellant, was carelessly and negligently suffered and permitted by the appellant to run wild down said incline towards the place where the appellee was engaged at work, and thereby, and by reason of this negligence of the appellant, the car ran into appellee.

In the second additional count it is alleged that it was the appellee's duty, as an employe, to work in and about and to pass to and fro in certain underground terminals or passage-ways called entries, and that in certain of the entries tracks were laid upon the ground, and along said tracks cars were drawn by mule power; that there was at that time in force a statute that on all haulage-ways on which the hauling is done by draft animals, where men are obliged to be in the performance of their duties, or have to pass to and from their work, there shall be places of refuge not less than two and one-half feet in width from the side of the car, and not less than four feet long, and five feet in heighth, and not more than sixty feet apart, and that at a certain place in one of the haulage roads the appellant knowingly and wilfully failed to provide refuge places not less than two and one-half feet in width from the side of the car, and not less than four feet long, and five feet in height, and not more than sixty feet apart, as required by the statute, and that while the appellee at the time and place, was in the proper performance of his duty, a certain car in the entry was carelessly and negligently suffered and permitted by the appellant to run downgrade towards the appellee, and that the car not being under the control of any person, was running wild along said haulage road; and that by means of said carelessness,and by reason of the violation of the statute aforesaid, by the appellants, the car ran into, and struck the appellee, and thereby injured him.

The third additional count alleges that it was the duty of the appellant to use reasonable care to provide the appellee a reasonably safe place in which to work, and not to unnecessarily

expose him to danger; and that it was particularly the appellant's duty not to suffer any other car used by it in the mine and under its control to run wild in an entry-way and against the appellee; and that, while the appellee was attempting to bring a car from the entry-way in appellant's mine into his room, a certain other car, which was then and there under the control of certain other servants of the appellant, was carelessly suffered to run wild down an incline or grade towards the place where the appellee was engaged at work, and that by reason thereof, while the appellee was using all due care for his own safety, the car so running wild down the grade, ran into him and struck him with great force.

The fourth additional count also charges that it was the duty of the appellant to use reasonable care in providing the appellee with a reasonably safe place in which to work, and not to expose him to unnecessary danger, and that it was particularly appellant's duty not to suffer or permit the roadways and tracks in and about its mine in which appellee was required to work, to have accumulated thereon refuse, dirt, coal and other substances liable to cause a car being propelled or driven or running upon said railroad track to be thrown or jump from said track, and thereby unnecessarily expose the appellee to the danger of being struck by such car; and that it was particularly the duty of the appellant not to suffer or permit any car to run wild down said track towards the place where the appellee was in the performance of his duty as a miner; that at a certain point where the car was standing in the mine entry-way, there was a hill or incline in the track, from the point where said car was standing to a point approximately sixty to seventy feet north thereof, which

sloped down towards the point where the car in question was standing which the appellee was about to bring into his room, and that along and upon the roadbed and track of the entry-way at or near the place where the appellee was employed, the appellant had theretofore carelessly suffered large quantities of refuse, dirt, coal and other substances to accumulate, which accumulation interfered with the operation of cars upon the track, and caused their operation on the track to become unnecessarily dangerous, in that such accumulation tended largely to cause the cars to be thrown or jump from the track; that while the appellee was attempting to push a car from along said entry-way into his room, a certain other car under the control of certain servants of the appellant, was carelessly and negligently permitted by the appellant to run down an incline at and towards the place where the appellee was engaged at work, and that by reason of this alleged carelessness of the appellant, while the appellee was in the exercise of all due care for his safety, said car ran into him.

It appears from the evidence that the appellee was a coal miner at work in appellant's mine, and that he was working in the second room off of the second entry, off of the sixth right entry, and that on the day in question, and just prior to the injury to appellee, two empty coal cars, and one car loaded with props, were standing on a switch in the main entry, and that from this point in the mine, where these cars were standing, there was an incline down to the second left entry towards the room where appellee was at work; that to hold the standing cars in position a rock had

been placed under the wheel of the first empty car, towards the incline.

Appellee testified that he had loaded a car of coal that morning in his room which had been pulled out by the driver with the mules; that he and an Italian digger, who worked in a room next to his, but whose name he did not know, went through the entries toward the place where the empty cars were standing to get empty cars to go in their rooms; that when the appellee got to the switch where the cars were standing he found the first empty car had been blocked with a rock; that he took the rock out from under the first car and put a rock under the wheel of the second car, and that he then took the first empty car and started down the incline, running it on the track towards his room; that at the first right entry there was a sheet of canvas which was kept closed so that the air would go to the face of the coal where the diggers were working; that this sheet of canvas was nailed at the top and hung loose, and separated in the middle, so that the cars pushed along the track could go through, and that when the cars passed through the sheets would close up again; that it was distant about 60 to 70 feet from the place where he got his car to where this sheet was situated; that he had gone through the sheet and was walking behind his car, and nothing had happened before he got through the sheet; that he went along about 20 steps farther, or about half way between the sheet and the second left entry which led to his room, when he was caught by an empty car, which was running loose; that just before the car reached him, he heard something and looked behind him, and saw the car coming and quickly stepped to the side of the track to save himself; but that when the car

reached the point where he was standing, it jumped the track right in front of him; that along the track where the car jumped off there were props lying along the side of the track, and there was also much dirt, so that in part the dirt covered the rail; that the dirt was up even with the top of the rail on the right hand side going towards the col; that when he stepped aside to avoid the approaching car he backed up against the wall and faced the track; that his left side was nearest to the car which struck him and that when the car struck him it broke his leg just two or three inches above the ankle.

The evidence also shows that when the appellee started down the incline with the empty car there were only two persons remaining behind,- the Italian, who had come with the appellee, and the witness, Tom Hocking. The Italian was not a witness on the trial but Tom Hocking, who testified for the appellee, stated positively that no one had touched the standing cars remaining on the switch, or the empty car which,from some cause,started down the track and ran into and injured appellee. There is no direct evidence in the record that the cars standing on the switch were in charge of any of the servants of the appellant, at the time the empty car started down the incline; nor does the evidence show what caused the car to start down the incline.

It is assigned as error that the first original count, to which the appellant had filed a demurrer, which the court overruled, does not state a cause of action, because it is based upon the requirements of a statute which is no longer in force, and that the court instructed the jury that the appellee had a right of recovery under the allegations of this count. This count

This count does allege erroneously that it was the duty of the appellant not to allow persons employed by appellant to enter the mine, or work therein, or to remain at work therein, unless they did so under the direction of the mine manager. This is not now a duty incumbent on the appellant under the present mining law. In so much as it clearly appeared in the evidence that the appellant did allow the appellee to enter the mine and work therein, without being under the directions of the mine manager, the jury could properly infer from the instruction of the court that in this respect appellant had violated a duty required of it by law, and therefore that the appellee had a right to recover on that ground; and the verdict of the jury may have been based, in whole or in part, on this erroneous idea of the appellant's statutory duty. The instruction of the court on this point was, therefore, reversible error.

We are of opinion that it was also error to admit the evidence concerning the habit of the Italian miner to allow his cars to run down the incline by force of gravity. (P.& U.Ry.Co. v Claysburg, Adm. 107 Ill. 645.)

For the errors indicated the judgment must be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

B-354

2837

205 I.A. 145

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6354

Bert Biederbeck, appellant.

vs Appeal from Co. Ct. Peoria.

Robert Tucker, appellee.

Niehaus, P. J.

The appellant, Bert Biederbeck, and the appellee, Robert Tucker, are adjoining land owners, and a dispute arose between them as to the proportion of the division fence between their lands, which should be maintained by each. In order to determine the matter the appellant, on the 27th. day of April 1913, gave the appellee notice, under Section 8 of the Fence Viewers act that he had chosen a fence viewer; and that unless the appellee chose another fence viewer, within eight days, as contemplated by the section referred to, that appellant would chose another, in conformity with the statute. The notice was received by the appellee, but not acted on, and appellant thereupon selected another fence viewer, and the two selected, on the 7th. day of May, 1913 gave the appellee notice that they would, on the 15th day of May 1913, at the hour of nine A. M. proceed to examine the fence in question, with a view of taking such action as the case might require; and on the day fixed, the fence viewers selected, met on the premises of the parties, and viewed the division fence in controversy. Both the appellant and the appellee were present at the meeting; and some testimony was taken. The fence viewers then made their decision, which was reduced to writing. They adjudged and determined, that a part of the division fence, which had been built by the appellant W. B. Biederbeck, up to a certain stake, and which they fixed in the ground, should be maintained by him; and that the appellee should maintain the balance of the division fence. They also adjudged that the appellant should put in a certain hog tight fence, commencing at the stake above mentioned, and running

Dec. 8th. 1914

Burt Stevenson, Architect,

To Grand Lake Co. Co. Centre.

Robert Taylor, Associate.

Michigan, P. O.

The enclosed, Burt Stevenson, and the accompanying, Dr. Burt Taylor, are applying Deck Houses, and a Garage annex thereto as the petitioning of the Grand Lake Centre Village Light Lamps, which should be maintained by each. In order to determine the matter its original, on the 27th. day of April 1914, Dr. the Village Trustees met in Town Station 2 of the Town Clerk's office, and had before them a Town Plan, as shown by the petitioners, within eight days, as contemplated in accordance with the ordinance. The matter was finally by the petition referred to, that same should notify, Dr. Burt Taylor, the Petitioner, but not notified, Dr. Burt Stevenson objected another Town Clerk's office, on the 5th. day of May 1914, at the hour of nine A. M. pursuant to ordinance the Town in question, with a view of hearing such matters as the case might require; and at 9:30 A. M. the Town Clerk, the petitioner, met in the Village of the parties, and viewed the location from in controversy. Both the petitioner and the [illegible] and [illegible] at the meeting; and upon investigation was [illegible] Dr. Burt Taylor, [illegible] Dr. Burt Stevenson, [illegible] Dr. Burt Stevenson, [illegible] Dr. Burt Stevenson

east of the corner, with the exception of 5 rods in the creek, where he should put in and maintain a four barbed wire flood gate; said barbed wire to be fastened good at each end, with stays of metal wire or wood, 12 feet apart, through the center. They also adjudged and determined, that if either of said parties wished to pasture the landsadjacent to this creek , with hogs sheep or goats, that he must fence against said hogs, sheep or goats, at his expense, across the creek. In determining the character of the fence to be built by the appellee, the fence viewers exceeded their authority; under the notice their authority was limited to fixing the proportion of the division fence to be maintained by each of the parties. (Hale v Andrews 75 Ill. 353.)

The decision of the fence viewers, in writing, was filed in the office of the Town Clerk, as required by the statute. The appellee did not comply with the decision of the fence viewers in any respect, and thereupon, on the 28th. day of May 1912, the appellant gave a notice to the appellee, under Section 11 of the Act referred to, that if the appellee refused or neglected to make and repair his proportion of the division fence, that appellant would, after the expiration of 60 days from the date of the notice, make and repair the same, at the expense of the appellee, and hold the appellee liable for all damages which might accrue to him thereby; which damage would be determined by the fence viewers who had been selected. After the lapse of 60 days, the appellant built appellee's proportion of the fence; and built it, so that it conformed to the requirements decided upon by the fence viewers. The cost of the fence built was $23.95. Thereafter, the suit was brought by appellee, to recover the cost of the fence so built; also to recover the fees and reasonable expenses of the fence viewers.

There was a trial by jury in the County Court of Peoria

Cpunty; and at the close of all the evidence, the Court directed a verdict for appellee; that appellant offered to prove on the trial, that the fence viewers originally selected, viewed the fence built by the appellant, to determine the amount of appellant's damages; he also offered the appraisement of damages, which had been made by these fence viewers. The court properly excluded this evidence, for the reasons hereafter stated.

The principal question arising on this appeal, is whether or not the Court should have directed the jury to find a verdict for appellee. The proceedings concerning the matter of determining the proportion of the division fence to be maintained by the appellant, and the appellee, appear to be in conformity with the provisions of the Statute, and under the notice originally given, the fence viewers acted within their authority in fixing the proportion of the fence to be maintained by the respective parties; but this, under the notice given, was all that the fence viewers had authority to do. The fence viewers originally selected, could not legally make the appraisement of the damages, because they were not selected for that purpose under the original notice; and it was therefore necessary, to give another notice to the appellee, so that he would have the opportunity which the Statute contemplates, of selecting one of the fence viewers to make this appraisement. The appellee could not be held liable, until his liability was determined by fence viewers selected for that purpose, in accordance with the requirements of Section 8. (Bigelow v Burnside, 369 Ill. 334.) (J. + A. # 5708)

For the reasons stated, there could be no recovery for the cost of the building of the fence in this case. But the appellant was entitled to recover half of the amount paid by him, for fees and reasonable expenses of the fence viewers, which were incurred in determining the dispute as to the proportions of the division

fence to be maintained by the respective parties. The Statute provides, that the fence viewers shall be entitled to one dollar and fifty cents per day each, for the time necessarily spent, to be paid in the first instance by the party requiring their services; and that all expenses of the view shall be borne by the parties equally. The question of the amount of such fees and expenses, which the appellant was entitled to recover, should have been submitted to the jury; and therefore, a verdict should not have been directed for appellee.

The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2839

205 I.A. 14

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 10 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6357

Eugene Hayden, appellant.

vs Appeal from Peoria.

Independence J. Miller,

appellee.

Niehaus, P. J.

This is a suit in assumpsit commenced by the appellant Eugene Hayden, in the circuit court of Peoria County, against Independence J. Miller, appellee, to recover $735 which the appellant claims, was borrowed from him by the appellee, in four separate items. The items in dispute were as follows: A promissory note for $500. dated November 10, 1913, payable to the order of appellant, 15 days after date; $50. on account of cash loaned; a check drawn on the Home Savings & State Bank, dated May 27, 1914, for $135.00, which the appellant cashed and paid over to the appellee; and a check drawn by the appellee for $50.00 dated December 28, 1914, on the Illinois National Bank, payable to appellant, upon which payment had been refused by the Bank.

There was a trial by jury, which resulted in a verdict for the appellant for $50. upon which the court rendered judgment and from such judgment this appeal is prosecuted. It is insisted by appellant, that upon the evidence presented to the juty there should have been a finding in his favor, for the full amount of his claim. The appellee admitted on the trial, that he had received from the appellant the various items which appellant claims to be due; he also testified, that he had paid all of his indebtedness to the appellant, except the $50. check given to appellant, which the Bank had refused to pay; also that he and the appellant, had had a settlement of their respective accounts, in which it was agreed between them, that

Gen. No. 6357

Eugene Hayden, Appellant.

va

Appeal from Peoria.

Independence C. Miller,

appellee.

Mr. 1.

This is a suit in assumpsit commenced by the appellant Eugene Hayden, in the circuit court of Peoria County, against Independence C. Miller, appellee, to recover $750 which the appellant claims, was borrowed from him by the appellee, in four separate items. The items in dispute were as follows: A promissory note for $250. dated November 10, 1913, payable to the order of appellant, 15 days after date; $50. on account of cash loaned; a check drawn on the Home Savings & State Bank, dated May 27, 1914, for $135.00, which the appellant cashed and paid over to the appellee; and a check drawn by the appellee for $50.00 dated December 28, 1914, on the Illinois National Bank, payable to appellant, upon which payment had been refused by the Bank.

There was a trial by jury, which resulted in a verdict for the appellant for $50. Upon which the court rendered judgment and from such judgment this appeal is prosecuted. It is insisted by appellant, that upon the evidence presented to the jury there should have been a finding in his favor, for the full amount of his claim. The appellee admitted on the trial, that he had received from the appellant the various items which appellant claims to be due; he also testified, that he had paid all of his indebtedness to the appellant, except the $50. check given to appellant, which the Bank had refused to pay; also that he and the appellant, had had a settlement of their respective accounts, in which it was agreed between them, that

nothing remained due, except the $50.00 on the check mentioned.

The appellant denied that the appellee had paid his indebtedness; and that they had had a settlement. Each of the parties introduced a number of checks, to corroborate their respective claims. The proof shows, that the appellee had been engaged in many different transactions with the appellant and that at different times, various amounts of money had passed and had been exchanged between them; principally by means of checks, but the evidence concerning the controverted matters rests practically upon the testimony of the appellant and the appellee; the testimony of the one being diametrically opposed to that of the other. Each is corroborated in some particulars, by the testimony of other witnesses.

The weight of the evidence in the case can only be determined by passing on the question, as to which of the parties is more worthy of belief, and this was a question for the jury who saw the parties and heard them testify, and observed their appearance and manner, were in the best position to determine. It does not follow as a matter of law, that because two witnesses testify diametrically opposite to each other, concerning a matter in dispute, that there is no preponderance of the evidence; but the preponderance is established when it is legally ascertained which of the two witnesses testify to the truth. Shaw v People, 81 Ill. 150; Boylston v Bain, 90 Ill. 383; Johnson v People, 40 Ill. App. 382; affirmed 140 Ill. 350. It is evident that in this case, the jury determined that appellees testimony was entitled to the greater credit; and there is nothing in the record, which indicates to the Court, that they were wrong in this conclusion. Under these circumstances the Court would not be justified in holding that the verdict is against the weight of the evidence; nor could the court say, that the jury should have believed the appellant instead

of the appellee.

Appellant also contends, that error was committed by the giving of the third instruction for appellee, which concerns the credibility of witnesses, and the testimony of the parties to the suit. The instruction is somewhat peculiar in language and perhaps not entirely free from criticism; yet we do not regard it as erroneous; and it is clear, that it could not have misled the jury into bringing in an erroneous verdict.

The record does not disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.

of the matter.

Applicant's counsel, that error was committed by the trial of the third interlocutor in relief, which sustains the certificate of attestation, and the testimony of the parties to the suit. The instruction is somewhat beautiful in reference thereto entirely free from criticism; let me not regard it as erroneous; and if it were, that it could have misled its duly trained mind to misconstrue its meaning.

The record does not disclose such injurious error.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2870

205 I.A. 148

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6375.

A. W. Billburg, appellant.

vs Appeal from Co. Ct. Rock Island.

August Schmid, appellee.

Niehaus, P. J.

This action of assumpsit, was brought by the appellant, A.W. Billburg, in the Cou ty Court of Rock Island County, to recover a sum of money claimed by him, which it is alleged was taken by the appellee, from the premises of appellant. The declaration consisted of the common counts; and the appellee pleaded the general issue. A jury trial was had, which resulted in a verdict for the appellee.

The appellant made a motion for a new trial, principally upon the ground that the verdict was clearly and manifestly against the weight of the evidence. The motion for a new trial however, was denied; and judgment was rendered against the appellant for costs; from which judgment this appeal is taken.

The appellant assigns for error, alleged mis-conduct of the appellee and one Hauberg, which occurred while the presiding Judge was temporarily absent from the court room. The misconduct, it is claimed, consisted of certain remarks in the presence and hearingof the jury, namely; that appellant was "a bad character and a gambler, and the proprietor of a gambling house"; and that the money sued for by the appellant, was taken by the appellee "from the gambling house of the plaintiff"; and for that reason the appellant "ought not to recover the money"; that the money no doubt belonged to persons who "had been victims of such gambling house"; and that it ought to be "turned over to some charttable institution"; that McBride was the owner of the tables referred to in the evidence; and was also "a gambler and a bad character", and was still "in the gambling

Ben. Ms. 61"3.

Y. T. Billbury, Appellant.

vs

Amount Borne (Co. Cr. Mult Island.

Nielsen, P. J.

This motion of Billbury, was brought by the appellant, Y.T. Billbury, in the Con ty Court of Fork Island (County), to recover a sum of money claimed by him, which it is alleged was taken by the appellee, from the premises of appellant. The defendant counterfeit of the common counts; and the appellee pleaded the general issue. A jury trial was had, which resulted in a verdict for the appellee.

The appellant made a motion for a new trial, principally upon the ground that the verdict was clearly and manifestly against the weight of the evidence. The motion for a new trial was denied; and judgment was rendered upon the verdict for appellee; from which judgment this appeal is taken.

The appellant assigns for error, alleged misconduct of the appellee and one Hawley, which occurred while the jury was temporarily absent from the court room. The misconduct, it is claimed, took place at certain remarks in the presence and hearing of the jury, namely; that appellant was "a bad character and a gambler, and the proprietor of a gambling house"; and that the money was for an old account, and "what difference does it make"; and that appellee "knew the landing scene at the Palisades"; and for that reason the appellant "ought not to recover the money"; that his money or part thereof belonged to the "Postal time of such gambling house"; and if sought to be "forced over to some charitable institution"; that Moffitt was the owner of the lumber - having it in the building; and was also "a gambler and a bad character". And was still "in the gambling

business and the proprietor of a gambling house in Peoria;" that the money ought to be "paid over by the defendant to some charitable institution."

It is sufficient to say in reference to this alleged misconduct, that appellant should have called the trial court's attention to this matter complained of, as soon as he had an opportunity to do so, so as to enable the court to counteract whatever prejudicial effect it might have had upon the jury. Inasmuch as he did not do so, he is not in a position to raise any objection concerning it here, but is legally deemed to have waived his objection. (Earl v People 99 Ill. 133; Vane v City of Evanston, 150 Ill. 616.)

The main ground urged for reversal of the judgment, however is that the verdict of the jury is manifestly against the weight of the evidence. The evidence shows, that the appellant conducted a saloon, in the city of Rock Island. In connection with this saloon, he occupied a room above it, in which there was a bed, a desk, also some ~~xhxix~~ tables and other furniture, including some which had been stored there by a man named McBride. The appellant, on September 15, 1910, when about to leave town for a short time, left his saloon, and the room above it, in charge of his bartender; and before leaving, placed in the drawers of the tables upstairs, $465, in money, of various kinds and denominations. This money in the drawers was also left in charge of the bartender, who on September 17th. went to this room "to make change" and found the money was still there in the drawers, and undisturbed. A few hours later, however, on the same day, the appellee, who was a constable, served a search warrant on the bartender; and they went upstairs to the room over the saloon, in which the money had been placed, and appellee took possession of some of the furniture in theroom,

under his warrant, as gambling paraphernalia; also took into his possession, the money which was in the drawers; which he testified amounted to the sum of $405.03; so the evidence clearly establishes the fact, that the appellee possessed himself of at least $405.03 of this money, which appellant had placed in the drawers of the tables. Although he did not claim the money as his own, or any right to the same, he refused to return it to the appellant, giving as a reason, that he did not know to whom it belonged; and mentioned the fact, that McBride also claimed the money.

It may be said in reference to this defense interposed by appellee, that, if McBride had made any legal claim for the money and the appellee was really in doubt as to which of these parties owned the money, the proper course for him to pursue, under these circumstances, was to file a bill of interpleader, whereby he could have relieved himself from the legal consequences of paying it to the wrong claimant; or if he was satisfied, that McBride was the real owner, and wanted to assume the burden of proving it, he could have called McBride as a witness, to show the fact of McBrides ownership. Nothing of this kind, however, was done. There is no proof in the record, which in any way tends to show that appellant's ownership of the money was questionable. Under these circumstances, it is apparent that the verdict for appellee is clearly and manifestly against the weight of the evidence; and the case should therefore be submitted to another jury.

The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6258

2842

205 I.A. 15

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and seventeen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
APR 19 1917 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6258.

Town of Magholia, appellant

vs Appeal from Co. Ct. Putnam.

Mark Kays, appellee.

Carnes, J.

This is a suit begun before a justice of the peace in the name of the town of Magbolia on the complaint of Amos B. Wilson against Mark Kays, the appellee, under the provisions of sections 151 and 155 of the Roads and Bridges act of 1913 (Laws of 1913, pp. 573, 575.) to recover the penalty there provided for obstructing a "public road." Wilson, as required by said section 155, gave bond for costs "as is provided for in case of a non-resident." There was a judgment for the defendant in the justice court. On appeal in the county court there was a verdict of not guilty and a judgment "That the plaintiff take nothing by this suit, and that the defendants go hence without day" and against Amos B. Wilson in favor of the defendant for costs of suit. Wilson prosecutes this appeal mainly on the ground that under the facts of the case appellee was guilty of obstructing a "public road". He also suggests that the court erred in entering a judgment against him for costs and awarding execution thereon.

The case was before us at a former term when we dismissed the appeal because there was no final judgment _____Ill. App.____ It has since proceeded to judgment in the court below. ~~Many~~ Many errors are assigned and argued that need not be discussed if the record with all the evidence admitted and excluded, taken together, does not permit a judgment against appellee.

The charge is that appellee obstructed a "public road". If he did not obstruct a public road he could not become liable in this action whatever private rights of Wilson or others he may have invaded. The facts are that Wilson, the complainant

Dec. No. 8822.

Town of Edgeville, plaintiff

vs

Burnet Iron Co. Ltd., Defdts.

Burk Kaye, atty for plff.

Curran, J.

This is a suit begun before a justice of the peace in the town of Edgeville on the complaint of Burk Kaye, the plaintiff, under the provisions of sections 182 and 185 of the Town and Village Act of 1913 (Laws of 1913, ch. 274, 575.) to recover the penalty there provided for the pollution of the public road." Wilson, an employee of the defendant, was arrested and brought before a justice for the purpose of answering the complaint. There was a judgment for the defendant on the merits. On appeal to the county court there was a reversal of the judgment and a judgment "that the plaintiff take nothing by this suit, and that the defendants go hence without day." An appeal from the judgment of the county court to this court has been taken by the plaintiff.

B. Wilson is the owner of the waste of coke ovens which he conducts from the premises of the defendant company to a "public road". He also maintains that the county road has become a public highway by reason of the long continued use of the public for more than six years. Judgment was reversed in the county court on the ground that the road was not a highway because it had not been laid out by the commissioners of highways, and that the defendant company had not maintained a nuisance in the highway. It does not appear that the defendant company has obstructed the highway in any way. It is the mere fact of depositing waste upon the land adjoining the highway which is complained of. The fact that the waste may be carried by the action of the elements into the highway does not make the defendant company liable for maintaining a nuisance in the highway. The case may be reversed, however, if the county court should find that the waste is deposited in such a manner as to create a public nuisance.

in 1903 and prior thereto owned a tract of land north of but not adjoining an east and west highway. One means of access to this land, from said highway was over the land of John A. Kays, now deceased (the ancestor of appellee) or the lands of Crispin Woods, which adjoined Kaye' lands. A petition was presented to the highway commissioners in January, 1903, for a public private road of the width of twenty five feet to be laid on Kaye' lands adjacent to his and W olds' line under the provisions of section 54 of the Roads and Bridges act then in force (Hurd's Stats. 1903 p. 1596) identical, so far as the questions here involved, with J. & A. Ann. Stats. Vol. 5. pgf. 9860. That statute requires the commissioners to proceed in case of petitions for roads for private and public use in accordance with section 78 of the following sections, (J. & A. 9837) providing the proceedure inpetitions for public roads. Section 79 (J. & A. 9838) requires them to fix the time when and the place where they will meet to examine the route of such road and to hear reasons for or against the laying out of the same, and to give notice of such meeting. Section 80 (J. & A. 9839) directs that the commissioners at that meeting decide and publicly announce whether they will grant or refuse the prayer of the petition, and enter upon or annex to the petition a brief memorandum of such decision to be signed by the commissioners and filed within five days in the office of the district clerk.

It appears from the commissioners' record that they gave notice of a meeting and at such meeting the following was entered on their records:

"Page 109-110.

"Special meeting of Commissioners of Highways, January 15, 1903.

"State of Illinois, County of Putnam, Town of Magnolia.

" A special meeting of the Commissioners of Highways

was held on the fifteenth day of January 1903 at McNabb Illinois in the McNabb Bros. Hardware store at 1 o'clock P? M. Present, the following Commissioners: Maron Wilson, Benj. Law and C. W. Awkland.

" At which meeting the following proceedings were had:

* *

"In regard to private public road between Kays and Woods (Petition on file) Granted by commissioners with no further expense to Townships hereafter.

"* *

"Benj. Law.

" H. S. Ellingfield, Town Clerk.

The trial court excluded this record above quoted on the ground that it was not a compliance with the statutory requirements and was not evidence that the highway commissioners had granted the prayer of the petition. Nothing else was ever done by the township authorities in recognition of a public highway at that place. The petitioner on the trial in the court below offered evidence that he and John A Kays were present at the time of this meeting of the commissioners and agreed between themselves that petitioner should fence a strip of Kay's land and adjoining Woods' land and put it in shape for travel, and that Kays should make no charge for the land; that this agreement was acted upon and a lane fenced out by Wilson on Kays land through which he could drive from the public highwayto his, Wilson's premises. The way was not used by the general public to any considerable extent, but was simply a useful passageway for Wilson and to some extent for Kays. It never had the appearance of a "public road" and has been a part of the time closed at both ends by gates. Wilson testifying on the trial in the county court said this road was opened up for my private use and for the private use of Mr. Kays. It consti-

tutes a private lane on the east side of Mrs. Kays' land.

Appellee obstructed this land or passage way and would be liable in this action if it was a public road. The substantial question presented and argued here is whether it was a public road.

We are of the opinion that there is nothing in the record of the highway commissioners warranting the conclusion that this strip of land was laid out by them as a public private road. Even if the record excluded by the court was competent as tending to show a laying out of the road under the provisions of the statute, it failed to comply with the technical requirements of the statute, and if those requirements could be disregarded the record entry means nothing more than that the commissioners concluded that Wilson and Kays could do what they pleased with Kays strip of land and the public authorities would assume no expense or responsibility in the matter.

It is argued that the agreement between John A. Kays and Wilson amounted to a dedication of this strip of land by Kays to public use, therefore there was a public road established by dedication. This cannot be because there was no acceptance by the public authorities. A way cannot become a public road by dedication of the owner without something said or done by way of acceptance by the public authorities.

The question arising on the judgment against Wilson for costs is little argued by either party. Appellant Wilson says he knows he is bound by the bond for costs and does not desire to shirk his responsibility, but he calls our attention to section 38 of our Costs act (J. & A. Ann. Stats. Pgf. 3743.) which provides the method of collecting from a party entering himself as security for costs by a fee bill and levy thereunder, and cites Whitehurst v Coleen, 53 Ill. 247, holding that statute constitutional. Appellee cites an abstract of an opinion in

Town of Canteen v Weber, 128 Ill. App. 405, in which the court is said to have held: "A judgment against a town for costs is improper in a suit by it to recover a penalty for the obstruction of a public highway, and Helmuth v Bell, 150 Ill. 363 in support of a suggestion that that part of the judgment may be treated as surplusage. There may be enough in this question to merit an extended investigation by counsel and serious consideration by the court if it was of any considerable importance in this case, but counsel have not so treated it in their briefs and arguments. Appellant in the whole proceeding assumed that he was the actual plaintiff, using the name of the Town of Magnolia as nominal plaintiff. He obtained leave of the court to prosecute the suit in that manner. The appeal bond filed by him is drafted on that theory. Whether he is right or wrong in that view we do not determine. In our opinion the judgment in bar in favor of appellee was right. The appellant Wilson is clearly liable under his cost bond for the payment of the costs. In the condition of the record and the briefs and arguments filed here we ought not to subject the parties to more trouble and expense by remanding the cause for a different judgment as to the costs. The judgment is affirmed at the cost of Amos B. Wilson.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6321

2873

205 I.A. 154

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 1 2 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6321.

Clarence Spiller, et al.

appellees.

vs Appeal from Grundy.

Charles B. Ensign et al

Charles B. Ensign, appellant.

Carnes, J.

This is an appeal under Section 183 of our Practice Act from an interlocutory order overruling a motion to dissolve an injunction.

The appellees, Clarence Spiller and Laura Spiller, filed their bill in the circuit court of Grundy County December 24 1915, against the appellant, Charles B. ~~Spiller~~ Engign, making the First National Bank of Gardner, and W. G. Howell, co-defendants praying for the surrender and cancellation of a note of appellees for $50.00 then in the possession of said bank where it had been sent by the appellant for collection, and for an injunction restraining the bank from parting with the possession of the note during the pendency of the suit. It is stated in the bill in language that would be understood by a layman, but partly inferentially, and not good pleading, that the complainants were farmers in Grundy County; that the defendant W. G. Howell a stranger to them, appeared at their residence purporting to be a specialist in diagnosing and curing diseases, and persuaded them that each had a serious malady, which he offered to cure for a consideration including the note in question, which note, however, he agreed to return to the makers if a cure was not effected or if they were dissatisfied; that they made and delivered the note to Howell; that the medicines were worthless and they, being dissatisfied, complied with the prescribed conditions and demanded the return of the note, which demand was not complied with; that attached to the note was a power of

Dem. No. 8021.

Clarence Spiller, et ux.

Appellees.

Va Effort from Treaty.

Charles F. Madgett et al

Charles J. Madgen, appellant.

Carnes, J.

This is an original motion for leave to file a
writ from an intermediate order overruling a motion to dismiss
an injunction.

The appellees, Clarence Spiller and Lucie Spiller, their
their suit in the circuit court of Lincoln County September 21
1910, against the appellant, Charles F. Madgett, setting
the First National Bank of Turner, and J. D. Hewitt, re-
straining for the entire [illegible] of a note of original
for [illegible] ties in the possession of said bank where it has
sent by the [illegible] for collection, and for an injunc-
restraining the bank from parting with the possession of the-
during the pendency of the suit. It is [illegible]
irreparable that would be sustained by a judgment, but merely
inferentially, and not upon pleading, that the consideration
were [illegible] in their entirety [illegible]
a stranger to them, [illegible]
be a specialist in diagnosing [illegible]
warned them that such [illegible]
care for a consideration [illegible]
note, however, [illegible]
are not affected or if they are [illegible]
but relieved [illegible]
but they, being [illegible]
conditions [illegible]
we not complied with) that although [illegible]

attorney under which a judgment could be entered against the makers in any county in this state; that this transaction was part of a general fraudulent business of the same nature conducted by Howell; that appellant knew the general nature of Howell's business and knew, or ought to have known, that this note was obtained by fraudulent means; that he had before engaged in such transactions acting as an alleged innocent purchaser of commercial paper fraudulently obtained by Howell and other quack doctors of his class; that he had taken an assignment of the note in question charged with knowledge of its fraudulent character, and therefore should not, in equity be permitted to collect it, and that if he were permitted to get possession of the note he would cause it to be entered up in some remote part of the State and thereby cause appellees much trouble and expense.

A temporary injunction issued without notice. Summons issued to the sheriff of Cook County, was served on appellant February 26, 1916, and returned as to Howell not found. The bank was duly served but did not appear. Appellant appeared and on March 18, 1916, moved to dissolve the injunction, which motion was on that day, on a hearing denied. He then, on the same day demurred to the bill, which demurrer the court then overruled. Appellant then obtained leave to answer the bill within two weeks, and April 1st, 1916, filed his answer to all the allegations of fact in the bill. Afterwards, April 15, he appeared and prayed an appeal to this court from the order "denying the motion of this defendant to dissolve the injunction heretofore issued herein," which was granted. The prayer and order for an appeal, and the appeal bond, each expressly limits the appeal as above indicated. We therefore disregard that part of appellant's assignment of errors and argument which is directed to the alleged error of the court in granting the injunction.

It appears that the only evidence offered on the hearing

on this motion to dissolve the injunction was a paper writing offered by appellant entitled "Affidavit". This seems to have been read to the court, but appears from the record not to have been sworn to: it denies many of the allegations in the bill, and states that the note was purchased before due by appellant and that it was past due at the time the bill was filed. The bill is silent on the question whether the note is or not past due. Appellant claims that we must consider the note past due at the time of the commencement of this action; therefore a court of equity would not interfere by an injunction because appellant could not cut off defenses by an assignment of the note, and cites the opinion of this court in Vanatta v Lindley, 98 Ill. App. 337, as holding that in the case of a past due note a court of equity will not interfere to relieve the maker of a power of attorney attached thereto from the consequence of being fraudulently induced to sign the same. That case was heard on appeal in the supreme court (198 Ill. 40) and the judgment of this court affirmed, but the supreme court in its opinion seems to have guarded its language so that the case can hardly be relied on as authority that a complainant may not be relieved in equity from the effect of a power of attorney fraudulently obtained from him. We do not think those two cases can be taken as decisively settling that question in this state.

The merits of the case are not passed on in considering the propriety of granting or dissolving a preliminary injunction. (Beech on Injunctions, Sec. 110; High on Injunctions, Sec. 13; Young v Fed. Union Surety Co. 183 Ill. App. 278.) An important inquiry is the relative inconvenience to be caused the parties if on final adjudication it appears that the court should not have made the order. (Russell v Farley, 105 U. S. 433; City of Newton v Levis, 25 C. C. A. 161; 28 Cyc. 751.)

In the present case it seems that appellant will be deprived of no right which a court of equity should undertake to guard if the note is impounded while he is litigating the issues that he himself has raised by his answer. On the other hand, appellees might, against equity and good conscience, be put to loss and expense if appellant is now allowed to get possession of the note. In consideration of those facts we are not inclined to disturb the order of the chancellor refusing to dissolve the injunction.

The question of the technical sufficiency of the bill is not before us, but we suggest that it could and should be amended so that allegations of fact relied on in its support should rest on clear averments and not on inference. The order is affirmed.

Order affirmed.

Order affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6349

2844

205 I.A. 156

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 4 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

205 - 156

Gen. No. 6449. Ag. No. —.

Gus Carlson,
Appellee,
-vs- Appeal fro[illegible].
Chicago Great Western
Railroad Company,
Appellant.

Carnes, J.

Gus Carlson, the appellee, was in the employ of Chicago Great Western Railroad Company, the appellant, as a section hand, appellant was engaged in and appellee was employed by it in interstate commerce. He had worked for the company as a section hand for several years. On the eleventh of November, 1914, he was working with his "partner" or fellow workman, Shipman, extracting spikes from ties by means of an instrument known as a claw bar, a crooked metallic bar, the shorter end terminating in a two pronged claw, which was inserted under the head of the spike, and after a proper hold was obtained appellee would press down upon the long arm of the lever, using the angle or "heel" as a fulcrum, and extract the spike. In some cases it was more difficult than others to obtain a proper hold upon the head of the spike because some of the ties were made of harder wood than others, or were in a better state of preservation, and where a hard wood tie was in a good state of preservation Shipman could hit the "head" of the claw bar with a maul to assist in driving it in. Appellee was accustomed to and familiar with this kind of work. He and Shipman had often done it, and their uniform custom was for [illegible]-

pellee to use the clar b.w .nd Shipm.n the h.mmer. On this day they had reached a bridge on which they were so operating, and as ap ellee was pressing down on the claw bar to raise the spike the bar slipped and he lost his balance and fell from the bridge, a distance of about eleven feet, and was injured. He brought this action to recover for that injury, alleging in his declaration that while he was in the act of pulling a spike, and in the exercise of ordinary care for his own safety, his fellow servant co-operating with him in the work of pulling said spike, carelessly, wrongfully and negligently, and wit out warning, struck the end (heel) of the cl w bar with a hammer causing the head of the spike to suddenly break off, and by reason thereof he, (appellee) was precipitated fro the bridge and received injuries. There was a jury trial. Appellland a the close of appellee's evidence oved for a directed verdict, which the court denied. The defendant introduce no evidence. There was a judgment on a verdict for $5000, from which this appeal is prosecuted.

Appellee, as a witness, furnished the only evidence of how the accident happened. Shipm.n was not called by either arty. It clearly appears that the work of pulling spikes in that manner had been done by appellee and Shipm.n many times before; that they were not directed by any superior as to the manner of doing it at the time in question, but were following an established custom between them of appellee's using the bar, attempting to insert the claws under the head of the spike. In some cases that was easily done, probably without the aid of the hammer. In others it might take one or more blows of the hammer to get the claw properly under the head of the spike. It was the uniform practice for Shipm.n to stand with his hammer watching appellee in the

operation, and strike the "heel" of the claw bar when and as often as he (shipman) thought necessary. Appellee did not direct him when to strike. Of course, if the claws slipped or the head of the spike came off while appellee was pressing down on the lever, it tended to throw him out of balance. This might have happened at any place other than on a bridge without much risk of injury, and probably did often happen in the course of such work. Appellee in his direct testimony states in rather uncertain terms that after the claw was properly underneath the head of the spike, while he was pressing down on the lever, Shipman struck the "heel" of the bar, thus knocking off the head of the spike and causing the bar to slip. But on his cross examination he makes it very clear that all he really knows about the situation is that the bar slipped; that he does not know whether the head of the spike came off or not; but that he was pressing down on the lever at a time when Shipman was hitting the "heel" and the bar slipped and he lost his balance.

A reversal is asked mainly on the ground that the uncontradicted evidence does not support the verdict.

The federal statute must be applied. Staley v I.C.R.R.Co., 263 Ill. 356. The case was tried by the plaintiff on the theory that the doctrine of assumed risk applies. It is not claimed that any violation of a federal statute enacted for the safety of employees contributed to the injury; therefore, the defense of assumed risk is not excluded. id,p.367, and this is not a case where the master is to be held an insurer of the safety of the servant while in his employment in interstate commerce. It is argued that appellee did not assume the risk of the negligence

A [illegible]

of his fellow servant, Shipman. Assuming that to be the law, appellant was not liable if it is not affirmatively shown that Shipman was guilty of negligence which was the proximate cause of the injury. We do not think the evidence shows that he was. There are many similar conditions where two men are working together, liable to accidents occurring while each party is exercising the care of an ordinarily prudent man similarly situated. Risk of accident and injury attends many if not most, mechanical operations. We think under the evidence in this record the injury here complained of was a result of such an accident. Appellee argues that it was a fair question for a jury. We conclude the trial court did not err in submitting the question to the jury. He could not direct a verdict for the defendant on the ground that the evidence would not sustain a verdict for the plaintiff. But on the motion for a new trial that question was before him for decision, and we are of the opinion that there was error in refusing that motion, and for that reason the judgment must be reversed.

There was some confusion in the plaintiff's testimony as to what did happen. As we have before said, Shipman was not called as a witness by either party.

The majority of the court are of the opinion that the cause should be remanded. We find no substantial error in instructions to the jury. The court instructed them, at the instance of the plaintiff what was charged in the declaration, without saying that those charges were denied by the defendant. If that might, as appellant suggests, mislead, the trouble can

misled.

be obviated by the defendants offering an instruction to that effect.

Reversed and Remanded.

Reversed and Remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

63164

2845

205 I.A. 157

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6564. .g. No. 65.

Mary Sabol.
Appellee,
-vs- Appeal fro. Will.

Joseph G. Meintz, John J.
Mellnitz, and Joliet Trust
& Savings Bank, a Corpor tion,
Ap ellants.

Carnes, J.

Appellee, Mary Sabol, April 23, 1913, filed her bill in equity in the circuit court of Will county to subject the premises of the appellants, Joseph G. Meintz and John J. Mellnitz, to the payment, as provided in section 10 of our Dramshop act (J & A pg. 4610) of a judgment of $800.00 ,which she obtained in said court September 18, 1913, under section 9, of said act, against Robert McMillin, a saloonkeeper, in a suit at law in which she filed her declaration October 9, 1911, and summons issued October 12, 1911, averring in her bill that the premises occupied by McMillin at the time he sold the intoxicating liquors complained of in said law suit, were the property of Meintz and Mellnitz, by them knowingly permitted to be used by McMillin for the sale of such liquors, with other appropriate averments as to said sale,of suit and judgment, and non-payment of the same by McMillin,to bring the case within the provisions of said section 10. It appeared that the Joliet Trust & Savings Bank was the holder of a trust deed upon said premises, securing a note for $1500 payable on its face to the order of Meintz and Mellnitz, and by them endorsed. The bank was made a co-defendant in the bill,and it is admitted here that said trust deed was a valid lien on the premises for any and all

Jan. 10, 1904.

-42-

Cause, 9.

obligations imposed by its terms superior to the rights of the complainant under her judgment. Issues were joined, and the chancellor, on proofs heard, entered a decree for the complainant subjecting the property of Heintz and Wellnits to the payment of the judgment, subject to the lien of the trust deed and the holders of the notes secured by the same "for the payment of so much as may be unpaid thereon," ordering the payment premises sold subject to the lien of said trust deed "for the payment of so much money as may be unpaid on the note secured thereby. Heintz and Wellnits prosecute this appeal from that decree, and in their brief and argument assign three grounds for its reversal, which, stated in the inverse order in which they are there formulated and presented, are:-

First,- That a court of chancery has no jurisdiction of the subject matter of the suit; the remedy at law,if any exists, is complete and adequate; said sections 9 and 10 are penal statutes; it is the universal rule in equity never to enforce a penalty.

Second,- That this being a proceeding to enforce a penalty the two years statute of limitations applies. The statute began to run at the time complainant's cause of action accrued against McMillin, and this suit was brought more than three years after that right of action accrued.

Third,- That the decree not only subjects appellants' equity of redemption in the premises to sale for the payment of the judgment, but by its terms invades the rights of the trustee and cestui que trust under said trust deed, because it only saves to them the right to enforce the payment of the note secured

by the trust deed, leaving them without remedy as to any lien provided in the trust deed in case the trustee should be compelled to pay taxes, assessments, mechanics' liens and insurance, and expenses of foreclosure, including solicitors fee, all of which are provided for in said trust deed.

Appellants' counsel have ably argued their first proposition citing many authorities in its support, which would require an extended examination and discussion but for the fact that the supreme court in Hall v Allen, 244 Ill. 456, and Garrity v Kiger, 272 Ill. 127 has very thoroughly discussed every question bearing on that contention, and decided that the lien provided by section 10 is properly enforced in a court of chancery. It will serve no good purpose to here repeat or paraphrase what is there said, Those decisions are controlling on the question of the court's jurisdiction, and if appellants' counsel are right in their position that "it is the universal rule in equity never to enforce a penalty and they support that position with much authority- then it would seem to follow that this proceeding is not to be taken as one to enforce a penalty.

The second position rests entirely on the first that this a suit for a statutory penalty and therefore governed by section 14 of our Limitations act (J & A pgh. 7209) which provides that actions for a statutory penalty "shall be commenced within two years next after the cause of action accrued." There is no ground for contention that a cause of action accrued against appellants' property under section 10 until the judgment was obtained in the common law suit. The claim is that because a cause of action at law accrued under section 9 against appellants as individuals when

the intoxicating liquor was sold by their tenant, therefore, this cause of action in equity must be held to have accrued then. This position cannot be maintained. The action at law against the owner of premises authorized by section 9 is something other and different from the chancery action against the premises under section 10. In the former action appellants could, on proper pleadings and proof, be made individually liable for the act complained of, all of their property could have been subjected to the payment of the judgment. In the latter action only the premises where the liquor was sold can be so subjected. Counsel suggests that it amounts to the same thing, but that does not necessarily follow. Such premises may not be worth the full amount of the judgment. The principles underlying the distinction between actions under sections 9 and 10 respectively are so fully discussed in the two supreme court cases before mentioned that we need not further comment upon them. To hold that the statute of limitations begins to run against the injured party in an action under section 9 before judgment in that action, would mean that his cause of action under section 10 accrued before he had any right to begin it, and in the ordinary course of legal proceedings in this state it would often happen that the aggrieved party could not obtain a judgment under section 9 within two years after his right of action accrued.

Appellee answers appellants' third position by saying that there is no question that the decree ought to have provided only for the sale of the equity of redemption of appellants in the premises, and should have left the premises subject to the lien of the trust deed for the enforcement of all the rights and privileges therein granted, and that the decree is capable of that meaning,

and that it was by inadvertence that it seems capable of the other construction. We do not think the decree admits of any fair construction that does not preclude the trustee's recovery of various items before mentioned, provided for in the instrument; therefore, we hol apppellants's third position well taken.

This disposes of appellants' contention here as their counsel formulate it in points presented for our decision. There is some discussion in their brief of the question whether the proof showed that McMillin was selling intoxicating liquor in appellants' premises at the time in question, and there is some contradiction and confusion in the evidence touching that question. Appellee does not discuss it because he says it is not included in the points presented by appellants. We have examined the evidence and conclude that it warranted the finding by the chancellor that the sales in question were made by McMillin in appellants' premises, which they then knowingly permitted him to use and occupy for the sale of intoxicating liquor. The chancellor tried the case on the theory that it was necessary for the complainant to prove that fact, but that the facts of sales of liquors by McMillin and consequent damages to complainant were fully adjudicated in the common law suit, and could not be controverted in this suit, which is in accordance with the settled law of this state.

The error which we have discussed under appellants' third point, as above numbered, is one that affects not only the bank and the holder of the note secured by the trust deed, but also the appellants. They are individually liable on the note and have a right to have all the obligations assumed by them under said

trust deed satisfied out of the property in question, regardless of appellee's rights under her judgment and decree therein. If in case of a foreclosure of the trust deed they should, because of the provisions of this decree, be compelled to pay the solicitors fee, or any other item there provided, it would affect them as injuriously as if the decree had erroneously provided that only a percentage of the indebtedness evidenced by the note should be paid

The decree is affirmed except as to said provisions of the trust deed, and in that respect reversed and remanded, with directions to so modify the decree as to provide for selling under the execution, subject to the lien of said trust deed, and to the payment of all sums secured or provided for therein.

Affirmed in part, reversed in part, and remanded with directions.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

11367

2847

205 I.A. 167

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 10 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6367 Ag. No. 27.

Oscar A. Kiess, Appellee,
-vs-
Block & Kuhl Co., Appellant.

Appeal from Peoria County, County Court.

JAMES, J.

Oscar A. Kiess, the appellee, sued Block & Kuhl Co., the appellant, operating a department store in Peoria, on a contract for commissions for selling victrolas in the year 1915, and had verdict and judgment for $311.66. The defendant appeals.

It appears without dispute that in January, 1915, appellee entered into an oral contract with appellant, represented by Clinton S. Fain, the head of its furniture department, and Theodore Kuhl, its president, to work for it, selling victrolas, for $35.00 a week, payable weekly, and a commission of 2½ per cent, due and payable at the end of appellant's fiscal year, which was the calendar year; that appellee worked until December, 4, 1914, and then, of his own motion, and solely because he was offered a better position elsewhere, quit; that commissions on his sales in 1915, if allowed, are correctly represented in the verdict. The controversy arises over the terms of the contract as to the time for which appellee engaged to do work, and whether his right to commissions depended upon his working for the appellant.

There is conflict of evidence as to what was said in that regard. The only parties who heard the conversation constituting the contract ~~xxy~~ seem to be appellee and appellant's said representatives, Main and Kuhl. Appellee had, under an oral contract, been in the same business for appellant since July, 1914, about six months before the contract here in question was made, at the same weekly salary, and a commission of 4 per cent, payable at the end of the calendar year That contract was made with appellant's same representatives. Appellee testified that neither that contract, nor the one here in question contained any stipulation as to the time he should remain in appellant's employ, or making his commission dependent on his statying any specified time. Main testified that after several conversations with Kiess in the summer of 1914, he asked him, Kiess, to make a proposition covering the time up to January, 1915; that he made a proposition of $35.00 a week, and 4 per cent. on personal sales for the balance of 1914; that that was the form of the contract that Kuhl, the president, was willing to make for the balance of the six months, to be readjusted at the beginning of the following year; that he, Main, told Kiess in the preliminary talk, that all appellant's contracts were made on a yearly basis and settlement for commissions was made in the January following the close of the preceding year, and that he must live up to his contract and stay there the year; that he took Kiess to Kuhl and told Kuhl that Kiess had agreed to enter into a contract up to Jan ary first, 1915, and was to receive a salary of $35.00 a week, and 4 per cent commissions, payable at the end of that time, provided he stayed with appellant and complied with the rules of the store, and Kuhl confirmed that agreement;

that Kiess work to January, 1915. The commission was paid then, at which time he, Main, had several conversations with Kiess wit regard to the 1915 contract, and took Kiess to Kuhl's office and Kuhl told him he would enter into the contract with him for the year 1915 at $35.00 per week, and 2½ per cent. commissions on his personal sales, to be paid in January, 1916, if he remained with plaintiff and filed out his contract for the year, and explained to hi that all contracts made by appellant with employees were made on a basis of one year, and Mr. Kiess agreed to it; that he, Main, expressly told Kiess if he left within the year he would forfeit his commissions; that in the latter part of November, 1915, Kiess came to him. Main, and said he had an offer from a Toledo firm, and that he probably could leave, but that he would try every way he could to stay until the close of the fiscal year, January first 1916, and later he came and showed him a telegram which was very imperative that if he wanted the position he must report there on Monday morning; that he said to Kiess, now if you leave us at this time, you realize that you are violating your contract with us, and you are forfeiting your commissions." And Kiess answered- I can't help it, this is such a wonderful opportunity that I will have to go;" that they had several conversations of that kind, and Kiess said he regretted having to leave and having to break his contract, but that he had an opportunity of a lifetime, and we would think so if we were in his place; that the president, Kuhl, told the witness to notify Kiess that he was breaking his contract, and he did so, and Kiess said he felt it was the opportunity of his lifetime and that he would be doing himself a great injustice if he did not accept it. Kuhl, the president, testified that Main brought Kiess to him in the summer of 1914, and they discussed the

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matter of the contract and general situation, and he, Kuhl, said- "we would employ him at the rate of $35. per week, and 4 per cent. commission, and I stated at that time that the commission was from that time to December 31st of that year;" that he made a strong point to impress Kiess, as he was in the habit of doing with other employees on the commission basis, that it would be of benefit for them to remain and get the commissions; that the commissions were paid only on condition they remained the required time; that the preliminariesfor the new contract were made by Mr. Bain, but the final conversation took place in the president's office in January 1915, and the substance was "that we employed Mr. Kiess for one year on condition that he remain with us one year for $35. per week and the commission to be paid him at the end of the year." Walter Overbach, manager of appellant's general business office, testified that when appellee left the store December 4, 1915, he had a conversation with him. He, Kiess, explained that he was leaving and had a charge account, and asked if he could have a little extention of time on that; that he would settle it within thirty or sixty days, and witness answered that he would be glad to grant him that extension; that the subject of his leaving the store was up, witness knowing it was an unusually busy time of the year, and Kiess explained to him that he had a very wonderful opportunity, and said he was sure that witness would do the same thing under the same circumstances; that they discussed the matter of his commissions, and witness told Kiess his contract for commissions would not expire until the first of January, and he would lose his commissions, and Kiess answered- "I know I will, but it is such a wonderful opportunity, so much better than this,that I will eventually make up for those commissions." Appellee went on the stand in

rebuttal and denied in detail every statement of appellant's three witnesses indicating that he was employed under either contract for a time certain, or that his right to commissions depended upon his working for any specific time.

This left a question of fact for the jury whether the contract was as appellee testified, or as appellant's two representatives testified. Appellee's testimony was entirely uncorroborated and that of appellant's two witnesses strongly corroborated by the witness, Overbach. The court did not err in not directing a verdict for appellant, because he could not do so without weighing conflicting evidence, which the law does not permit; but on motion for a new trial he was required to consider that question, and if the verdict was, in his opinion, manifestly against the weight of the evidence he should have granted the motion. He had, at the instance of plaintiff, properly instructed the jury if they believed from the evidence that he plaintiff was to receive a certain commission upon sales made by him, payable at the end of the defendant's fiscal year, and no time was fixed by the terms of said agreement that the plaintiff was to remain in the employment of the defendant in order to entitle him to receive said commissions, then the fact that the plaintiff quit before the expiration of the year did not of itself bar him from recovering commissions. And at the instance of the defendant if the contract was to continue for a period of one year, then, before the plaintiff could recover he must show by the preponderance of the evidence that he fully performed the contract made for the full term for which he was hired; that if he did not perform the contract as he agreed, and for the full term thereof, then he could not recover.

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We do not think under these instructions the jury could reasonably find for the plaintiff. It is true that the jury number of witness does not alone control, and that the verdict of jury sanctioned by the trial court, should not be disturbed on review unless manifestly against the weight of the evidence; but to sustain a finding for the plaintiff it must be assumed that his testimony was more credible, weighed more, than that of the three witnesses for the defendant. Plaintiff, as a witness, comes in direct conflict with each of those three witnesses. He certainly had as much interest in the event of the suit as did either one of them. We think it entirely unreasonable that his testimony should be allowed to outweigh that of the three combined. We conclude that the judgment cannot be permitted to stand; that the verdict is so manifestly against the weight of the evidence that any verdict for the plaintiff on that evidence should be set aside. We see no indication that another trial would result in different evidence; therefore, it is useless to remand the cause.

Counsel have called our attention to many authorities construing contracts where it is held there is no specification of time of employment. These authorities would require attention, if we were justified in considering the contract as claimed by appellee. We think it too clear for argument or discussion that if the contract was as claimed by appellant there was a time named and a condition specified, and that appellee, as the court instructed the jury, was bound to perform the contract on his part as a condition precedent to his right of recovery.

Reversed.

Finding of Facts:-

We may find the contract in question require appellee to remain in appellant's employ until December 31, 1915, as a condition precedent to his right of recovery and that appellee did not so remain.

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STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

2849

205 I.A. 183

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6[illegible]57. [illegible]. No. 47.

George [illegible]. [illegible]mann,
Complainant [illegible]nd [illegible]ppellant,

-vs-

Origin[illegible]l [illegible]ill.

[illegible]os B. [illegible]hrens,
[illegible]efendant [illegible]nd [illegible]ppellee,

Appeal from Whitesi[illegible]e.

[illegible]os B. [illegible]hrens,
[illegible]omplainant and [illegible]ppellant,

-vs-

Cross-Bill.

George [illegible]. [illegible]mann,
Ster[illegible]ing [illegible]epart[illegible]ent Store,
George [illegible]. [illegible]mann, [illegible]nd [illegible]d
Kreider,
Defend[illegible]nts and [illegible]ppellees.

Carnes, J.

George [illegible], [illegible]mann filed [illegible] bill for injunction [illegible]gainst [illegible]os B. [illegible]hrens. [illegible]hrens [illegible]nswere[illegible] [illegible]nd filed [illegible] cross bill for [illegible]n injunction [illegible]gainst [illegible]mann [illegible]nd others. Issues were joined, [illegible]nd t[illegible]e cause submitted to t[illegible]e [illegible]aster in chancery to report t[illegible]e evidence without his findings thereon, which he di[illegible], [illegible]nd t[illegible]e court, on [illegible] hearing, dismissed both the bill [illegible]nd the cross bill for want of equity. The complainant [illegible]nd cross-complainant have each [illegible]ppeal-ed upon the [illegible]ame record.

The [illegible]hrens depart[illegible]ent store was [illegible]n Illinois corporation, org[illegible]nized in October, 1906, with [illegible]n [illegible]ut[illegible]orized capit[illegible]l stock of $25,000. (250 sh[illegible]res p[illegible]r v[illegible]lue $100 e[illegible]ch) November 15,1913, only 210 s[illegible]res ($21,000) w[illegible]s outst[illegible]nding, and t[illegible]at [illegible]ll stood in the n[illegible]me of [illegible]os B. [illegible]hrens except [illegible] few sh[illegible]res which he controlled It did [illegible]n [illegible]nnual business of [illegible]bout $90,000. On t[illegible]at [illegible]ay [illegible]hrens entered into [illegible] written [illegible]gre[illegible]ent with George [illegible]. [illegible]mann to

sell him within five days seventy shares of the capital stock for $7000, which Mann agreed to pay, and also represented that he was a skilled and competent dry goods man and would take active management of the dry goods department in said store, and devote all his time thereto. It was stipulated in the writing that each party should draw $30.00 per week as salary, and that Mann should have an option and privilege of purchasing an additional number of shares of the capital stock at $100. per share to make him a holding equal to Ehrens; also provided that if either party should wish to sell any of his shares the other party should first be given an option to buy the same and that if Mann should be dissatisfied and wish to sell his holdings and withdraw from the business at the end of three years Ehrens should buy his stock, paying par value, together with six per cent. interest on the amount invested by Mann from the time of such investment. The stock was transferred and Mann paid for it and entered upon his duties in the store in accordance with this agreement. August 6, 1914, more than eight months after the first transaction, Mann, who had been engaged in the store all the intervening time, entered into another written contract with Ehrens to purchase the remaining one hundred forty shares of the stock for $14,000, $1000, cash upon delivery of the stock, and $13,000 in deferred payments of $2600, each, on or before one, two, three, four and five years after date respectively, evidenced by five promissory notes, each bearing interest at the rate of five per cent. from date. It was stipulated in the contract that Mann intended to and might pay $30.00 or more upon the one of said notes, which should mature first, upon every Monday morning thereafter. Mann paid the $1000, and made a number of weekly

payments until in February, 1915, about six months after this last purchase he had paid in all $3400, on his second purchase of stock. Meantime, he procured a change of the name of the corporation to Sterling Department Store, and on October 30, 1914, he transferred one share of stock to his son, George Mann, Jr., and another share to Leo Kreider, the bookkeeper.

At the time of the second sale of stock one asset of the corporation was a book account against Ehrens for $13,919.45. He kept purchasing at the store after his last sale of stock and contracted a further indebtedness there of $530.20. The liabilities at the date of the last sale of stock were an indebtedness to a local bank of $1,500, and several debts for merchandise aggregating about $16,500, making a total indebtedness of about $28,000. Mann seems to have taken Ehrens' word as to the indebtedness, and Ehrens told him that there was a note of $11,000 to the bank, and four or five thousand dollars merchandise accounts. The real debt was $13,000 more than Ehrens represented it to be. March 4th to March 1st, 1915, Mann employed Baker, an accountant, to audit the books of the corporation, and in that way learned the amount of its liabilities.

The corporation brought suit in assumpsit against Ehrens March 15, 1915, on its account against him up to that date, and the next day Mann, as complainant, filed a sworn bill in chancery against Ehrens in the same court, to which he attached as exhibits the two written contracts before mentioned, and alleged that he did not know of the liabilities of the corporation except as Ehren stated until he received the report of the accountant so employe

by him; that he had not access to the corporation books, before his second purchase and relied on Ahrens' statements, which were untrue, and made by Ahrens for the purpose of deceiving and defrauding him, and he was thereby deceived and defrauded, and prayed that Ahrens be enjoined from collecting the notes in his hands evidencing payments to be made under the second purchase of stock, and that the notes be delivered up and canceled, without offering to return to Ahrens the stock so purchased. Ahrens answered this bill denying its allegations of fraudulent acts on his part, and averring that he made no representation as to the corporate indebtedness except at the time of the first purchase of stock by Mann, and that Mann had access to the books and accounts of the corporation and at the time of the second purchase knew, or ought to have known, as much about it as he did. Ahrens then filed a cross bill in which he averred that after the written contract evidencing the second purchase by Mann was executed, and at the time when he was receiving the money and notes from Mann in payment for the remaining stock, he said to Mann, in substance, that he then owed the corporation nothing, and the corporation owed him nothing, and that Mann assented. In other words, that the consideration for the purchase of the remaining two-thirds of the stock was not only the cash and notes recited at length in the written contract, but also the release by the corporation of Ahrens' debt of $1,919.45. His counsel say that Mann, as an individual, could execute a valid release of this corporate debt because at that time he owned all the stock of the corporation.

The evidence reported by the master showed that Mann was an experienced merchant, and had no acquaintance with Ahrens until

his first purchase of stock; that both sales and purchases of stock were largely brought about by Weber, a traveling man, who was acquainted with both parties; that he was not purporting to act as a broker in the matter, and made no charge for his services but that Ahrens paid him $200 in the first transaction, and $500 in the second. There was no confidential relation existing between the three parties, or any two of them. At the time of the first transaction Mann did not ask to see the books, and between that time and the second transaction he apparently could have seen them at any time if he had wished, but he did not look at them and did not ask for, or have the combination of the safe in which they were kept when not in use. There seems to have been a set of books and papers from which an accountant could ascertain the condition of the corporation. Apparently the average business man, who was not a bookkeeper, could not have readily ascertained from an examination of the books and papers, but any intelligent man could have seen by such examination that Ahrens' statement was not true, and that ordinary business prudence required the service of an experienced bookkeeper to formulate an intelligent statement from the books and papers. No man of ordinary prudence would have considered the purchase of the stock without some statement purporting to be made from written data. It seems likely that Ahrens, himself, had no accurate knowledge of what the books show. The evidence leads to the conclusion that he did make the statement to Mann as to the merchandise indebtedness, as charged by Mann; and Ahrens admits that he made a mistake of $200 in stating the bank indebtedness. We think that Ahrens did knowingly understate the amount of the corporate indebtedness, though very likely he did not himself know the exact amount. But we do not understand

how Mann, for that reason, could be relieved by a court of equity from the payment of his notes given for the last purchase. He was still in possession of the property, and did not offer to return it, or ask that the contract be rescinded. He caused the name of the corporation to be changed and disposed of two shares of his holdings of stock. He did not filed his bill asking for such relief until seven months after the transaction complained of, and all that time he was in charge of the store and business, connecting it as he saw fit. The misrepresentation of Ahrens upon which Mann grounds his claim for relief was about a matter that he could have readily ascertained the truth of. Equity does not permit one to shut his eyes to plain obvious facts and long afterwards ask to be relieved from the natural consequence of his negligence. A party defrauded in contract must, if he wishes relief, disaffirm at the earliest practical moment after the discovery of the fraud. (Musick v Gatzmeyer, 47 Ill. App. 329.) It is his duty to at once repudiate the contract and tender back what he has received under the contract so that the other party may be placed as nearly as possible in the same position he occupied before the contract was made. (Day v Fort Scott Investment Co., 153 Ill. 293; Brady v Cole, 164 Ill. 116; Naugle v Yerkes, 137 Ill. 353; Greenwood v Penn, 136 Ill. 146; Bavarian Brewing Co., v Farrar, 163 Ill. 471; Anderson v Chicago Tr and Sav. Bank 195 Ill. 341) He cannot speculate upon his venture and if it turns out profitably affirm the contract; or, after a series of experiments if it turns out unprofitably, disaffirm it.

After the case was heard by the court and as he was about to announce his decision, July 15, 1915, Mann entered a motion to amend his bill by inserting a more detailed statement as to cash

that had been paid by him on the contract of August 6, 1914, and an offer to return to Ahrens, properly assigned and enforced over to him, all of said one hundred forty shares of the capital stock that were transferred to Mann under the contract of August 6, 1914, and asking for a cancellation of that contract, and averring that the indebtedness of the corporation is (at the time of the requested amendment) $1000 more than existed on the 6th of August, 1914, but that the stock of merchandise and all personal property owned now by the corporation is of greater value by more than $1000 than was the stock of merchandise and all personal property owned by it August 6, 1914, and the shares of stock are of greater pecuniry value than they were at that day. Leave to file this amendment amendment was refused,on which action of the court error is assigned and argued. The court did not err for several reasons, The application did not excuse or attempt to excuse the delay in offering the amendment, which was one year and three months after Mann had procured an accounting and actual knowledge of the corporate indebtedness, over a year after Ahrens had filed his answer and cross bill, eight months after the cause had been referred to the master to report the evidence, and over a month after the case had been heard and taken under advisement by the court. The proposed amendment tendered new and different issues from those that had been tried, and were about to be determined. It was averred in the amendment that the stock was now of greater value than when it was purchased by Mann, though the corporate indebtedness had increased in the meantime. An investigation of that allegation would have raised many questions other than the corporate indebtedness and value of the merchandise, and led into an extended inquiry as to the real or market value of the stock at those dif-

ferent times; also, for reasons, and on the authority of cases before noted, Mann could not at this late day disaffirm the sale or recover back what he had paid. We are of the opinion that the court did not err in refusing leave to file this amendment and dismissing the original bill.

We are also of the opinion that the court did not err in dismissing Ahrens' cross-bill for want of equity. The whole transaction does not put Ahrens in a position to appeal to the conscience of a chancellor. The $7000. that he first received from Mann, the purchase price of one-third of the capital stock of the corporation, was by Ahrens put into the business and his account with the corporation was credited with that sum. The balance standing against him, as before mentioned, was after deducting that $7000. He also took the note of the corporation for $7000 for the same sum of money, which he produced and had canceled on the trial of the case. His counsel argue that that was a piece of carelessness; and perhaps it was. But Mann was properly refused relief in equity largely on the ground of his own negligence and carelessness in the matter. The same reasons have weight in considering the question whether Ahrens is entitled to equitable relief. But independent of that, his ground for relief is that Mann at the time of the second purchase of stock agreed that his debt to the corporation should be canceled. He testifies on the hearing that such an agreement was made. Mann denies it, and Weber, who was with the parties during their negotiations, says he heard no such statement. They put their contract in writing at the time. Weber was taking an active part in the negotiations, and, considering the size of this item, it is not credible that if Ahrens' version is true it should have escaped insertion in the writing, or the knowledge of Weber.

ber.

There are many things about the whole transaction that seem absurd and incredible in any view of the case; that Ahrens should have been for several years commuting so large a business and knowing so little about it as he did is to have known, or that Mann, an experienced merchant, should have bought into it without any more knowledge than he seems to have had, and been deceived in matters that the most casual inquiry would have discovered the truth of, seems beyond belief; but the record discloses that strange condition of facts. We are satisfied with the conclusion of the chancellor. The decree is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

2850

205 I.A. 185

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6389.

Etha J. Calhoun, appellee.

vs Appeal from Peoria.

Central Illinois Light Co.

appellant.

Carnes, J.

Etha J. Calhoun, the appellee, while engaged as janitress in a tenement four apartment building in Peoria March 30, 1915. was injured by an explosion from a Ruud Instantaneous Automatic Water Heater then the property of the appellant, Central Illinois Light Company. She brought this action to recover for that injury and had a verdict and judgment for $800.00. The defendant prosecutes this appeal. It is not argued that there was error in the instructions to the jury except the refusal of a peremptory instruction to find for the defendant, and no very material error in the rulings on the evidence is suggested. The main question is whether under any fair view of the testimony appellant could be held negligent and appellee in the exercise of ordinary care at the time in question. If she was entitled to a verdict it is not claimed that the damages are excessive. The heater was installed in the basement of the building eight or nine months before the accident under some arrangement between appellant and one Anderson, who then owned the building, that it should remain the property of appellant until it was paid for. When in operation hot water was produced in any room in the building by turning the hot water faucet in that room. Anderson became bankrupt, and one O'Brien purchased the building early in March. 1915. Appellant claimed the heater as personal property, which was conceded, but the heater was left in the building, appellant desiring to sell it to O'Brien. After a few days O'Brien concluded it was too expensive in its consumption of gas and so informed appellant, and requested that it

Gen. No. 6098.

Ethe J. Calhoun, appellee.

vs Appeal from Curtis.

Central Illinois Light Co.

appellant.

Curtis, J.

Ethel J. Calhoun, the appellee, while employed as janitress in a tenement four apartment building in Peoria Tract No. [illegible], was injured by an explosion from a Tungs instantaneous hot water heater then the property of the appellant, Central Illinois Light Company. She brought this action to recover for that injury and had a verdict and judgment for $500. The defendant prosecutes this appeal. It is not argued that there was error in the instructions to the jury except the refusal of a peremptory instruction to find for the defendant, and no very material error in the rulings on the evidence is complained. The main question is whether under any fair view of the testimony appellant would be held negligent and responsible in the matter of ordinary care at the time in question. If the was original to a verdict it is not claimed that the damages are excessive. The heater was installed in the basement of the building about six months before the accident under some arrangement between appellant and one Jamieson, who then owned the building, that it should remain the property of appellant until it was paid for. Then in operation hot water was delivered in the building by turning the hot water faucet in that room. Jamieson became bankrupt, and one Dillon purchased the building early in March, 1913. Appellant claimed the heater as payment [illegible] property, which was contested, but the heater was left in the building. Appellant started to sell it to Dillon. After a few days O'Brien examined it and [illegible] in the connection of gas and no injured explained, and requested that it

be removed. Appellants agent asked permission to attach a meter so that it would measure only the gas consumed by the heater and undertake to demonstrate in that way that water could be economically heated. O'Brien consented, and a special meter was put in by appellant. The building had been occupied by tenants up to about the time O'Brien bought it, but was during that month of March vacant except appellee and her family resided in the basement where they had been since October 1914. She did janitress work, including looking after this heater, for Anderson and then O'Brien, in compensation for her rent. A few minutes before the accident a painter and paper hanger sent there by O'Brien to do some work upstairs, met appellee in the yard and said he would need some hot water. She told him he could get it at any hot water faucet he cared to use, and went into the basement and lit the pilot light. That light had sometimes theretofore sucked out when a hot water faucet upstairs had quickly closed. She stayed nearby to turn off the gas if that should again happen. The painter went upstairs, and after the water had been running from one to two minutes there was an explosion; a large quantity of soot was thrown out into the basement, pieces of iron were thrown off from the heater, and appellee was thus seriously injured. Her claim is that the explosion was occasioned by the negligence of the defendant in not cleaning out the chimney, and pipe, and coils, and irips, and burners; that because of accumulation of soot therein the pilot light would not ignite the gas flowing up and around it but would only light it when the gas filled the drum and backed down almost to the burners. Appellants theory is that appellee did not light the pilot until after the painter had opened the faucet and thus turned on the gas and therefore the explosion was caused by appellee's careless act. It is also ~~xxix~~ claimed that appellant was under no duty

to take care of the heater by removing accumulations of soot; that appellee was familiar with the machinery and its operations and knew, or ought to have known, of its dangers. If the accident was occasioned as appellant claims, it was not guilty of negligence and appellee was not in the exercise of reasonable care, and not entitled to a judgment. But we must assume that the jury found the accident was occasioned, as appellee claims, from the accumulation of soot and stoppage of vents designed to permit ignition of gas from the pilot light, and there was sufficient evidence to support that finding to forbid our reversing the judgment on that ground.

Appellant urges that the transaction was one of bailment for the mutual benefit of itself and O'Brien; and that it was trying to sell O'Brien a second hand article and there was no implied warranty that it was fit for use, and no duty resting on appellant to put it in order. We think under the circumstances of this case appellant was guilty of negligence if it knew, or ought to have known, that the heater was, because of its condition, liable to such an accident. It was undertaking to make a sale to O'Brien and the heater was there at the time and place in question to demonstrate that it could be successfully and economically used. If appellant knew that its ordinary use might result in damage and destruction, we think the law so far follows common prudence and common sense in that regard that appellant should be held under a duty to remove the cause of danger.

The court at the instance of appellant instructed the jury that the burden was on the plaintiff to show that the heater was at the time of the explosion clogged up and out of its proper working condition for such reason; that it was not sufficient to show that possibly such condition could exist. And if the condition did exist, still the defendant was not liable

unless it had knowledge thereof at the time of its delivery to O'Brien. There was evidence that appellee had told appellant's agent that the pilot light would suck out when a faucet was shut. This tended to prove actual notice to the defendant that should have put it on inquiry that would have discovered the difficulty. We are further inclined to the opinion that when appellant put in the special meter and left O'Brien and his servants to make the test operations, it was under a duty to discover whether the machine was in working order. It knew that appellee and her family were living in the basement and that she would attend to the operation of the heater. The jury were warranted in finding that the condition causing the accident had not materially changed after the time of putting in the special meter. We conclude that the allegations of the defendant's negligence causing the injury are sustained by the evidence.

But it is said that appellee knew, or should have known, of the defect, and therefore she was not, herself, in the exercise of ordinary care for her own safety. She did know that there was some defect in the working of the heater, but she did not know what, nor how it might be remedied. Had the heater been owned by her employer she could hardly have been expected to have done more than to suggest the matter as she did to agents of the defendant, relying on them either to remedy the evil or instruct her how to do so. At most the evidence can only be construed as showing that she knew the defect but did not know the danger. In cases of instruments and machinery with which one is familiar, and with instruments in common use like an axe or a hammer, the user does ordinarily know the danger of defect, and knowledge of the defect practically amounts to proof of knowledge of the danger, and in such cases it is often true that using the instrument with knowledge of the

danger amounts to contributory negligence, and while knowledge of danger does not, as a matter of law, defeat a recovery for an injury received, yet it is in all cases an important factor for the ~~xxxxxxxx~~ consideration of the jury. (29 Cyc. 512) But the inquiry is whether the plaintiff knew, or should be presumed to know, not only the defect but also the danger. (I. C. R. R. Co. v Anderson 184 Ill. 294.) The jury were fully warranted in finding that appellee did not know and was not charged with knowledge of the danger from whatever defect of the heater she knew of. We conclude she was properly held in the exercise of ordinary care at the time in question.

Appellee in endeavoring to show the jury that the accident might have happened the way she claimed from the backing up of gas caused by the clogging up of vents introduced an expert witness, and perhaps did not in questioning him sufficiently observe the rule forbidding an opinion on the question before the jury; but the effect of his testimony was only to show that a certain supposed condition of the heater would produce certain results, and we see nothing in the manner in which the question was asked to lead us to suppose that the evidence would have any different effect had technical rules been followed. Finding no reversible error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6393

2852

205 I.A. 194

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 19 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6393. Ag. No. 50.

Fred C. Brown, et al, Appellees,
-vs- Appeal from Livingston.
Phoebe Saathoff, et al,
Appellees.

(Gertrude Brown Irrison,
Appellant.)

Carnes, J/

Gertrude Brown Irrison, appellant, December 4, 1915, filed her petition in the above entitled partition case setting up that she, as devisee of her father, Fred C. Brown, was entitled to a share of the proceeds of the sale of a farm made in 1904 by the master in chancery, U.W.Lauderback, the appellee, and had never received the same, or any part thereof. It appearing that appellee had never reported his distribution of the proceeds of the sale, a rule was entered on him to show cause. He filed a report and amended reports. There was a hearing on objections thereto in which testimony was introduced by both parties, and the court entered a decree July 14, 1916, overruling the objections and finding that appellee, as master, had paid the distributive shares and disposed of the property in his hands in accordance with the decree of distribution, holding appellant guilty of laches and approving the report, from which decree this appeal is prosecuted.

There is little dispute about the facts. Fred C. Brown, the father of appellant, January 15, 1904, resided in Saint Louis, Missouri. He was the owner of a one-eighth undivided interest in one hundred sixty acres of land in Livingston county, which was the subject of said partition proceeding. On that day the bill for

partition was filed by him and seven other complainants by C.C.& L.F.Strawn, their solicitors. An interlocutory decree was entered May 11, 1904. Commissioners were appointed, who reported the land incapable of division, and a decree of sale was entered May 17, 1904. The master sold the premises June 18, 1904, for $18,720, and on the same day reported his sale to the court. Fred C. Brown died June 6, 1904, and on the 24th of that month C.C.& L.F.Strawn suggested his death and asked leave to amend the bill "making the heirs and devisees of said F. C. Brown, deceased, parties defendant to this suit." Leave was granted and amendment to the bill filed July 1, 1904, averring the death of Fred C. Brown, leaving as his only heirs at law and legatees "Gertrude Brown, his daughter, of legal age; one Sophia Brown, his wife, of legal age; and one Mrs. L. Masterson, of legal age;" and that they are entitled to the distributive share of said Fred C. Brown, praying summons for those three parties, and that they be required to answer. August 31, 1904, the record shows an entry of appearance filed by Louisa Masterson and Gertrude L. Brown, as follows:-

"State of Illinois
"Livingston County ss In the Circuit Court
" To the October Term,A.D.1904.

"Fred C.Brown,et al,)
" v. ; Bill for Partition, #3565.
"Phoebe Strathoff,et al.)

" Louisa Masterson and Gertrude Brown, whose names are hereto subscribed,are defendants in the above entitled cause and hereby waive the issuing,by the Clerk of the said Court and the service by the Sheriff of the summons and consent that the Court shall have and does have jurisdiction in said cause the same as though said summons had

Gertrude L. Brown, as follows:-

"State of Illinois
") ss. In the Circuit Court
"Livingston County) of the October Term, A.D. 1904.

"Fred C. Brown, et al.,)
") Bill for Partition, &c.
"Phoebe M. Thelin, et al.)
"

" Come Defendants and Gertrude Brown, whose name is hereto subscribed, are referenced in the above entitled cause and hereby waive the issuing, by the Clerk of the said Court and the service by the Sheriff of the summons and consent that the Court shall have and does have jurisdiction in said cause the same as though said summons had

"been issued from the Clerk's Office from said Court and regularly served on said defendants, as and for ten (10) days or more prior to the First day of said Term and consent that all the orders in said cause shall be as binding as though said summons had been issued and served according to law as aforesaid.

" Louisa Masterson,
" Gertrude L. Brown.

"Witness to Signatures:-

" Leo Nassieurs."

File marks, "Filed Aug.31,1904. Erastus Hoobler clerk."

Gertrude Brown was born in Saint Louis, December 4, 1888, and consequently was fifteen and one-half years old when her father died. She says she signed the paper shortly after her father's death, in Judge Rassieur's office in Saint Louis; that Mrs. Masterson, the other signer, told her to tell the judge she was of age, and she did so; that Mrs. Masterson said if she did not her stepmother, with whom her father was then having trouble, would get her share. October 13, 1904, Gertrude Brown and Louisa Masterson were defaulted for want of answer, and the cause referred to the master for additional proof. He reported October 17, 1904, the death of Fred C. Brown, leaving legatees, as before stated, and that the share of Gertrude Brown was two-thirds of t e eighth belonging to her father, or one-fifth of the whole property. October 17,1904, the court heard proof as to attorneys fees. L.F.Strawn testified that C.C.& L.F.Strawn filed the bill and represented theinterests of Fred C. Brown, Fred G. White, and other complainants; that they suggested the death

of Fred C. Brown and amended the bill and had the matter referred back to the master for evidence and conclusions, and prepared the decree of confirmation of the sale, and for distribution. October 21, 1904, a decree confirming the sale and ordering distribution was entered directing the master, after deducting certain sums, to pay to "Gertrude L. Brown, daughter of Fred C. Brown, or her solicitor, one-twelfth." The question of attorneys fees and some other matters were reserved for future determination. A decree was finally entered May 6, 1907, disposing of all those matters. Meantime, appellee had ceased to be master in chancery and the final decree fell to his successor to execute. Very little of the purchase price of the land had actually come into appellee's hands. Two of the parties were lawyers, and receipts were passed between those interested as to a large part of the fund. Strawn & Strawn claimed to represent the legatees of Fred C. Brown, and the master settled with them except for $500, which he was ordered by the court to retain, and it was retained in another party's hands to await the final disposition of matters still pending, which were finally disposed of on the report of appellee's successor as master in chancery. There is no question that appellee did pay Strawn & Strawn before the first of January, 1905, the entire amount that appellant was then entitled to under the orders of the court. If appellant had then been of legal age and had employed Strawn & Strawn to represent her, there would be no further question in the case. She testified that she did not employ them, and of course she could not have made a valid contract of employment because she was a minor. The record does not disclose what Strawn & Strawn did with the money received by them. If

they had been her authorized solicitors in the case, the master could have discharged his duty under the decree if the court by paying them, and would have been under no obligation to see that they settled with their client.

Section 31 of the Partition act (J & A.pgf.8344) provides for the distribution of the proceeds of the sale by the master"t the persons entitled thereto according to their interests as directed by the court." No question is raised here as to the validity of a payment by the master to the solicitor when the decree directs him to do so. While Strawn & Strawn did not appear of record as the solicitors for appellant, the master might well presume, under the circumstances, that they would represent her interest. The fact that they had caused her to be made a defendant in theprodeeding did not change her interest or make it antagonistic to other complainants represented by Strawn & Strawn more than was her father's while he was living and employed said attorneys to act for him with his co-complainants. It is the interest of the parties in the subject matter of the litigation that is regarded in chancery and not their place in the title of the cause. Appellee might have required Strawn & Strawn to furnish evidence of their authority to represent appellant and should have done so before paying to them her distributive share of the estate, but the authority of attorneys is rarely questioned when they appear in legal proceedings. The courts presume authority. (People v Parker, 231 Ill. 478; Famous Manf.Co.,v Wilcox, 130 Ill. 246; Ferris v Commercial Nat.Bank. 158 Ill. 237.) The chancellor and master in chancery were acting under two mistakes of fact: One that appellant was of legal age; the other that she had employed Strawn & Strawn to represent her. There is no

evidence or intimation that the master or any one else taking part in the trial knew that she was not of legal age. She does not claim that she was induced by any one except Mrs. Masterson to misrepresent that fact. She was old enough to understand, and did understand, that she was, in misrepresenting her age, attempting to perpetrate a fraud. If she had told the truth it is to be presumed that a guardian ad litem would have been appointed by the court to protect her interest and that she would have suffered no loss. She made no move in the matter until she was twenty-seven years old, when she filed this petition. It does not appear that she has been under disability any of the nine years after she became of age. Appellee had let the matter pass out of his mind, and heard nothing about it until this petition was filed. While it is true that he had been negligent in not filing a report, still there was some excuse for it. The matter passed to his successor in office with various questions unsettled. There were several attorneys personally interested in the fund. One of the tenants in common bought the land at the master's sale, and while we do not excuse appellee in failing to report his proceedings in the matter and ascertain the authority of Strawn & Strawn to collect appellant's money, still it is plain that he acted honestly and in good faith, and left matters quite largely in the hands of the various lawyers interested in the case, which, however inexcusable, might often happen under such circumstances.

We conclude that appellant, herself guilty of the first fraudulent act that led to the loss here complained of, must be held by her nine years of silence after she reached her ma-

jority to have co firmed that act and placed herself in a position wher she should not be relieved by a court of equity from the loss, which, without that act, would not have occurred. The decree is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6014

2853

205 I.A. 196

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No; 6394.

Frank Hockings, appellee

vs Appeal from Grundy.

Thomas Westmoreland, appellant.

Carnes, J.

Appellee, Frank Hockings, sued the appellant, Thomas Westmoreland, in assumpsit, October 13, 1914, in the circuit court of Grundy county. Summons issued returnable to the March term of that court, and was served that day. A declaration consisting of the common counts was filed May 15, 1915. Afterwards, at the March term, 1916, the defendant was defaulted and judgment entered against him for $363. and costs of suit. Afterwards, at the same term, the defendant appeared and entered a motion to vacate the judgment and set aside the default, and for leave to plead. The court heard affidavits read by the respective parties in support of, and resistance to, the motion and entered an order overruling the motion, to which the defendant excepted and prayed an appeal to this court. The prayer for appeal was in general terms without specifying what he appealed from, and was allowed, and time granted to file an appeal bond and settle a bill of exceptions. An appeal bond was filed in the usual form reciting an appeal from the judgment in the cause.

Various errors are assigned and argued on the ruling of the court in refusing the motion to open the judgment and set aside the default. We are of the opinion that there was not a sufficient showing of diligence on the part of the defendants to entitle him as a matter of right, to that relief. But it is assigned, among other errors, that "there is not sufficient evidence in the record to sustain the judgment." The entire evidence shown by the record upon which the judgment was entered read as follows:-

Gen. No: 8394.

Trent Docking, Appellee

vs Appeal from Grundy.

Thomas Westmoreland, Appellant.

Cause, 1.

Appellee, Trent Docking, sued the appellant, Thomas Westmoreland, in assumpsit, October 13, 1913, in the circuit court of Grundy county. Summons issued returnable to the March term of that court, and was served that day. A declaration consisting of the common counts was filed May 12, 1913. Afterwards, at the March term, 1913, the judgment was instituted and judgment entered against him for $350. and costs of suit. Afterwards, at the same term, the defendant appeared and entered a motion to vacate the judgment and set aside the default, and for leave to plead. The court denied all three and the respective parties in support of, and resistance to, the motion and entered an order overruling the motion, to which the defendant excepted and prayed an appeal to this court. The prayer for appeal was in proper terms without specifying what be appealed from, and was allowed, and time granted to file an agreed bond and settle a bill of exceptions. An agreed bond was filed in the usual form reciting an appeal from the judgment in the cause.

Various errors are assigned and urged on the ruling of the court in refusing the motion to open the judgment and set aside the default. We are of the opinion that there was not a sufficient showing of diligence on the part of the defendant to entitle him as a matter of right, to that relief. But it is vested, among other errors, that "there is not sufficient evidence in the record to sustain the judgment." The entire record as follows:-

F r a n k H o o k i ngs,

The plaintiff, called in his own behalf, having been duly sworn testfied as follows:

DIRECT EXAMINATION.

by Mr. Hayes.

Q Your name is Frank Hockings? A Yes, sir.

Q You are the plaintiff in the case?

A Yes, sir.

Q How much money have you paid the defendant? Have you got the memoranda here?

A $389.59.

Q There is three yesrs interest. You figured that out?

A $43.41.

Q How much taxes? A Thirty Dollars.

Q Total due you of how much? A $363.00.

MR. HAYES: That's all, I think."

It may be questioned whether the plaintiff was entitled to a judgment for any amount of damageson that evidence. As a general rule a default admits the cause of action and the material traversable allegations of the declaration, although not the amount of the damages, and hence the amount to be recovered is all plaintiff is required to prove or defendant permitted to controvert." (33 Cyc. 761) His testimony amounted to a conclusion that there was due him from the defendant $363. But even if that could be taken as a basis of judgment for that amount and an inference indulged that the 389.59 that he paid the defendant was a loan or something, that the defendant should return ~~ks~~ him, which is contrary to the legal presumption arising on the mere payment of money by one party to another, it still appears that there was $30;00 included in the judgment that the plaintiff had paid as taxes without irs appearing why the defendant should be liable for that amount. But if we infer

Frank Hoosk ings,

The plaintiff, called in his own behalf, having been duly sworn testified as follows:

DIRECT EXAMINATION.

by Mr. Hayes.

Q Your name is Frank Hoskings? A Yes, sir.

Q You are the plaintiff in the case?

A Yes, sir.

Q How much money have you paid the letter back? Have you got the memoranda here?

A $250.50.

Q There is three years interest. You figured that out?

A $43.41.

Q How much taxes? A Thirty Dollars.

Q Total the you of how much? A $323.00.

MR. HAYES: That's all, I think."

It may be questioned whether the plaintiff was entitled to a judgment for any amount of interest that evidence. As a general rule a default admits the cause of action and the material traversable allegations of the declaration, although not the amount of the damages, and hence the amount to be recovered in all plaintiff is required to prove or interest permitted to controvert." (13 Cyc. 781) His testimony amounted to a confession that there was due him from the letendant $323. But even if that could be taken as a basis of judgment for that amount and an interest finding that the $23.59 that he paid the letendant was a loan or something that the letendant should return to him, which is contrary to the legal presumption ar ising on the face payment of money by one party to another, it still appears that there was $300.00 included in the judgment that the plaintiff had paid as taxes without its accruing why the letendant should be liable for that amount. But if we infer

that he paid the amount of taxes for the defendant, still we have the item $45.41 sworn to as three years' interest, and included in the judgment. There is no evidence of any contract to pay interest, or of any fact which would entitle plaintiff to interest under any provision of sections 1 and 2 (J. & A. Pgh. 6880, 6881) of our Interest act. In the absence of such evidence the item of interest was erroneously included in the amount of damages assessed. The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6397

2854

205 I.A. 197

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6397. S.No. 52.

John . offman,
Appellee,

-vs- Appeal from Peoria.

Chicago, & Northwestern
Railway Company,
Appellant.

Carnes, J.

In November 1906, appellee, John . Heffman, purchased a nine acre tract of farm land in Peoria county, across which tract extended the bed of a creek. More than forty years before that time the C.B. . . Railroad was built across that creek some three hundred feet down stream from this tract of land. It had a high embankment constructed at that point and a bridge across the stream under which the waters flowed. Twenty years or more before appellee's purchase the course of that creek had changed and run over lands on the other side of the C.B. . . embankment. In 1901 the appellant railway company acquired a right of way one hundred feet wide adjacent to the C.B. . . and constructed its road there about two hundred feet from appellee's land, with a solid embankment. It appears that before the time of appellant's construction, the C. B. . . bridge had been removed and a solid embankment constructed there, except that at sometime there was a trap or opening through the embankment so that water could escape from appellee's land along the old creek channel through that opening into the new channel

Before commencing the present suit appellee had sued appellant in the same court for damages occasioned to his land in the five years 1908 to 1912 inclusive, and had verdict and judgment for $50.00, which appellant paid. He brought the present suit for damages accruing in the three years 1913 to 1915 inclusive, and had verdict and judgment for $600.00, from which the company prosecutes this appeal.

The first suit was tried on a declaration charging that the defendant constructed an embankment for railroad purposes on a strip of ground adjacent to the right of way of the M.K.&T. Railroad company, and within two hundred feet of plaintiff's land that before such construction by the defendant there was a natural water course across its right of way with sufficient opening and outlet to permit all waters flowing into Kickapoo Creek to be carried off without damage to plaintiff's land; that the defendant constructed said embankment contrary to law, without leaving any opening or outlet for water flowing therein to flow into Kickapoo Creek; that by reason of such construction of said embankment the water that previous to said time flowed down and through said natural water course, collected and are now collecting, and backing upon, and overflowing plaintiff's lands. The first of the two counts in the present case was the same as that declaration except as to the time and amount of damage averred. The second count averred that the defendant had during said three years complained of, notice and knowledge that its said embankment would injure the damage/plaintiff's premises; that it was sued by the plaintiff for such damages so occasioned for the years 1908 to 1912 inclusive as will appear of record, in which suit plaintiff recovered and

collected from the defendant damages on said account for said five years; that the damages for said three years were wilfully, maliciously, and negligently, as above alleged, inflicted by the defendant by violation on its part of the statute of the state of Illinois providing that in no case shall a railroad company construct a roadbed without first constructing the necessary culvert or sluices as the natural lay of the land requires,or the necessary carriage thereof in the building, as foresaid, of the said solid roadbed or embankment, without opening to permit the free passage of water which naturally flowed down said channel. In the former case the general issue and statute of limitations was plead; in the present case the general issue only was plead.

On the trial of the present case the plaintiff introduced testimony as to the damages occasioned by water in said three years; that the physical condition of the defendant's embankment had not changed since the beginning of the former suit, and introduced in evidence the declaration, pleas and record of the verdict and judgment in that suit, and testified that the judgment was paid. Defendant offered evidence that the C.B.& Q. embankment obstructed the flow of water towards the creek from said tract of land, and that defendant's embankment did not increase the amount of water upon that land; that at the time defendant constructed its embankment there was no natural flow of water at that point, but that it was obstructed long before; that the C. B.& Q.obstructed the water before defendant's embankment was built. This testimony was objected to by the plaintiff on the ground that the liability of the defendant was tried between said

parties and adjudicated in the former suit, and also because the fact that some other embankment might have obstructed the water if allowed to cross defendant's embankment, would be no defense. It was immaterial what the other road would have done if defendant did not obstruct the flow, and would, at most, only show a joint liability of said companies, for which the defendant would be held. The court sustained objections to this offered evidence "in so far as the evidence concerning the C.B.& Q. embankment is concerned". The defendant then offered to show that in 1882 employees of the C.B.& Q. Railway Company, with farmers owning land in that vicinity, filled up an opening in the C.B.& Q. embankment at the point in question, and that it had continuously remained solid and no water had gone through except ordinary seepage since 1882, and that the defendant did not add to the conditions complained of by the construction of its embankment; which was objected to on the ground that the evidence was not competent as to what the C.B.& Q. did with its embankment; if the C.B.& Q. obstructed a water course previous to the construction complained of it would be no justification, and that the obstruction by the defendant is an adjudicated matter. The defendant further offered to show that the owner of said tract of land in question assisted in the work of closing the water course; that it was closed by the C.B.& Q. at the request of the property owners; which was also objected to by the plaintiff as immaterial, irrelevant and incompetent, and not binding on the plaintiff; and both objections were sustained. The defendant offered in evidence three instructions to the jury given on the trial of the former suit for the purpose, counsel said, of showing what was submitted to the jury at that trial. They were, in substance

that if prior to the defendant's construction complained of the embankment of the C.B.& Q. obstructed the flow of water into Kickapoo Creek and caused water to stand in the old creek on the land owned by the plaintiff, and that the defendant's embankment did not add to the obstruction already there, and did not increase the volume of water which would stand upon plaintiff's land because of the C.B.& Q. obstruction, the plaintiff could not recover; that if an opening under the C.B.& Q. embankment had become closed and was no longer used before the defendant's construction complained and defendant's construction caused no additional obstruction, the plaintiff could not recover. Plaintiff's objection to this evidence was sustained.

Appellee's position as to the law is indicated by the foregoing. He insists on two propositions: First, that ~~EVEN~~ independent of the former judgment, even though the flow of water had for many years before appellant's construction been obstructed by the C.B.& Q. embankment, still that was entirely immaterial in this proceeding to recover from appellant for obstructing the flow by its said embankment; second, that appellant is estopped by the judgment in the former suit to raise any question here whether the water complained of would have remained on and damaged the land just the same had its embankment not been built. We think the first position untenable. While it is true that one wrongdoer cannot defend on the ground that he is responsible only for a part of the damage complained of occasioned by himself and others associated with him, yet it is ~~TRUE~~ not true that one wrongdoer becomes responsible for all the wrongful acts affecting the property in question committed by others entirely independent

fro[illegible]. There is no [illegible]r presumption that the act of the C.B. [illegible]. was wrongful, or that its embankment, if solid, was not rightfully there at the time when appellant constructed its road. Appellant had the right to show, if it could, that the C.B. [illegible]. embankment was there obstructing the passage of water from appellee's land at the time it constructed its road. This question is settled in [illegible]ney v C. & E.I.R.R.Co., 235 Ill. 503. That was, as here, a question of obstructing ~~xxs~~ a water course, the defendant offered evidence to show that the land beyond its trestle had so filled and risen that the water would not longer flow in its natural course, and insisted that it was not bound to go upon the lands of others and cut a channel below its own road, and that it was useless to clean out its trestle because the water could not flow away from it. It was held that the trial court properly refused to direct a verdict on that ground, not because the evidence was in fact true, but because it was contradicted, and the trial court, for the purposes of that motion, must consider the evidence of the plaintiff's as true; but it was said that the trial court properly left the question of fact for the jury whether it would or not have been useless to keep the defendant's trestle open.

There is no question in the recent case of a former adjudication of the entire cause of action. To be such it must appear that the cause of action and the thing sought to be recovered are the same in both suits. There must be identity of parties, of subject, and of the cause of action. Markley v The People, 171 Ill. 260; but as the court said in that case:- "There

"is, however, a clearly defined distinction between that class of cases where some controlling fact or matter material to the determination of both causes has been adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again in issue between the same parties. In this latter case the adjudication of the fact or matter in the first suit will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. This is generally denominated estoppel by verdict.' Leopold v City of Chicago, 150 Ill. 563; Wright v Griffey, 147, id.496; Hamm v Mead, 102 id.596."

It is said in Black v Boyd, 211 Ill. 290, 295, quoting from Hamm V Mead, 102 Ill. 596:- " This species of estoppel is known to the law as an estoppel by verdict and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense." And in Chicago Title & Tr. Co.v Storage Co. 260 Ill. 488,493,- " An estoppel by verdict is but another branch of the doctrine of res judicata, and it rests upon the same principle of law- that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction, cannot again be controverted." This court said in Hamann v Connolly, 155 Ill. App. 504, 509,- " Where a judgment is offered in evidence in bar of a claim and it is uncertain from the record what was adjudged, parol evidence is admissible to show what testimony was given and what questions were submitted for determination at the time the judgment was entered," citing authorities. The doctrine is limited to matters necessarily involved in the litigation, but it is equally applicable whether the point was itself the ultimate vital point, or only incidental but still necessary to a decision of the case. (Leopold v City of Chicago 150 Ill. 563,574.) Many cases are cited on the question of

estopped by verdict in People v Locklin, 273 Ill. 106, where it is held that extrinsic evidence was not admissible to show that a judgment was refused for reasons other than those specifically stated in the record. The general rule is that parole evidence is admissible not to determine what the adjudication was, that being settled by the record alone, but to determine what was adjudicated upon. (Langmuir v Landes, 113 Ill.App.134, 137.) The court in Barger v Hobbs, 67 Ill. 592, 595, used the following language:- " The rule is thus accurately and concisely stated by Mr. Justice Barrows in Sturtevant v.Randall, 53 Maine, 140: ' What appears by the record is to be proved by the record only, and nothing contradictory thereto can be admitted; but what need not, and in fact does not, appear by the record, if necessary to establish the identity of the subject matter, or of the grounds upon which the judgment proceeded, may be supplied by parol proof, to the extent of showing whether matters that might have been admissible under the pleadings were, or were not, actually presented and considered in the adjudication.' See also Bigelow on Estoppel 5, Shepard v.Butterfield, 41 Ill. 76."

In the early case of Zimmerman v Zimmerman, 15 Ill. 84,86, the court, in discussing this question, said: " Parol evidence is frequently admissible to show what was adjudicated upon,not to show what the adjudication was." In Palmer v Langer, 143 Ill. 34,40, the court, quoting from text writers, said:- "And though the declaration in the former suit may be broad enough to include the subject matter of the second action, yet if, upon the whole record, it is doubtful whether the subject matter was actually passed upon, parole evidence will be admitted to show the truth."

In that case parole evidence was held admissible to show whether an item of a claim presented for allowance in the probate court was in fact passed upon by the court. It did not appear from the record whether it was or not, except the judgment was not so large as it would have been had the court allowed all of the several items of the claim. The appellate court of the first district, speaking through Justice Duncan, in Robinson & Co.v Barr,181 Ill. App. 605, citing Berkley v The People, supra, and on the question of estoppel by judgment, said:- " 'In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matter is the judgment conclusive in another action.' ' The burden of proof is always upon the defendant, who pleads res judicata, because of a former judgment, to set up that judgment, and show what was determined by it, and what is common to the subsequent action. The proof must be clear, certain and convincing.' There must be no uncertainty as to the precise question raised and determined in the former suit, and it must appear upon the record, or by extrinsic evidence, that that precise question is a controlling issue in the second suit, or the judgment in the first suit will not operate as an estoppel. Theological Seminary v People, 169 Ill. 439; Cromwell v County of Sac,94 U.S.351; Denike v Denike,44 App.Div.(N.Y.) 631;*** It is not sufficient to show that the matter in question was pleaded or in issue in the former suit. It must also appear to be precisely determined." -3-

We do not see how it can be said in the present case on the face of the record admitted in evidence that there was an adjudication in the former case of the question whether appellant was liable for all the damages occasioned to appellee's land from the failure of water to escape to the creek, or was only liable for so much damage as it might be held to occasion by the construction of its embankment one hundred feet nearer appellee's land than was the C.B. & .. embankment. Independent of any question of pleading, we think appellant had the right to show that the damages in the former proceeding were not in fact assessed on the theory of law that appellant was liable for the entire damage. There is nothing in the judgment offered in evidence to show whether they were or not, except comparing that judgment for five years' damages with the present judgment for three years' damages we might presume, as did the court in the Palmer case, that appellee was not there allowed his entire damage from water. The instructions offered in evidence and excluded show that the court in the former trial held that appellant was not liable except for any increase that the evidence might show in the flooding of the land occasioned by its embankment. If it can be shown, as it seems it can from the above authorities, that a party on the trial withdrew one item of his demand, as indicated by the pleadings, from the consideration of the court, we do not see why it would not be competent to show that the court withdrew one item of the demand from the consideration of the jury and obtained a verdict and judgment excluding any consideration of that item. Apparently in the former trial appellee's contention here as to the law was either not made, or not sustained by the court. Instead of obtaining an adjudication there in support of his con-

tention here, he apparently obtained one directly against his present contention.

It follows from the above discussion of the law that we are of the opinion the court erred in the admission and rejection of evidence, and giving, modifying and refusing instructions insofar as the court's action was variant from the views here expressed, and for that reason the judgment must be reversed. Various questions are presented and argued by appellant, but insofar as we regard them substantial they are answered by what we have before said. Appellant suggests that appellee did not plead former adjudication, but that question was not presented to the court below, and is not before us. Much may be found in text books covering the subject of res judicata on the necessity of pleading an estoppel when it is relied upon. The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

Nicholas, P.J. took no part.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2858

205 I.A. 232

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 19 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6402.

C. F. Irwin, appellee.

vs Appeal from City Court Elgin.

J. M. Manley et al.

appellants

Dibell, J.

This is a suit in equity brought in the city court of Elgin by Clinton F. Irwin against J. M. Manley, R. H. Kramer and others, by which complainant sought to obtain a decree that a certain lot four in the city of Elgin, owned by Irwin, was not subject to the lien of a judgment obtained by Manley and Kramer against James Sullivan on December 15, 1911 in the city court of Elgin. The bill claimed the facts to be that formerly Sullivan owned this property and occupied it as a homestead with his wife, Ella Sullivan; that, on October 6, 1911, Sullivan and wife placed an incumbrance thereon to secure an indebtedness of $750. which has not been paid; that Manley and Kramer obtained said judgment against Sullivan on December 15, 1911, while said premises were still homestead; that on that day Sullivan left his wife; that on the next day she filed a bill for divorce in the Circuit ~~city~~ court against him, and that Irwin was her solicitor; that Manley and Kramer were solicitors for Sullivan; that there was a decree of divorce on January 4, 1913; that that decree found that Sullivan bought this property with the joint earnings of himself and wife; that Sullivan appropriated to his own use all the proceeds of said incumbrance, which was still unpaid; that the decree gave Mrs. Sullivan title to said premises and their household furniture for her alimony; that said decree was recorded on that day in the recorder's office of Kane County in which Elgin is ~~located~~ situated; that on the same day and after said decree, Mrs. Sullivan conveyed said

Can. No. 8166.

C. T. Irwin, appellee.

vs Appeal from Clay County Court.

J. M. Murray et al.

Appellants

Dibell, J.

This is a suit in equity brought in the city court of Elgin by Clinton T. Irwin against C. B. Murray, C. Cheney and others, by which complainant sought to obtain a decree that a certain lot four in the city of Elgin, owned by Irwin, be not subject to the lien of a judgment obtained by Riley and Kramer against James Sullivan on December 18, 1911 in the city court of Elgin. The bill charged the facts to be that formerly Sullivan owned this property and occupied it as a homestead with his wife, Mila Sullivan; that, on October 6, 1911, Sullivan and wife placed in Commissioner Pierson's hands an instrument of $750. which has not been paid; that Murray and Cheney obtained said judgment against Sullivan on December 18, 1911, while said premises were still homestead; that on that day Sullivan left his wife; that on the next day she filed a writ for divorce in the [illegible] court against him, and that Irwin was her solicitor; that during put Sullivan said relinquished to Sullivan; that there was a decree of divorce on January 6, 1912; that since then Sullivan bought this property with the joint earnings of himself and wife; that Sullivan contributed to his own use all the proceeds of said instrument, which was still unpaid; that the decree gave Mrs. Sullivan title to said premises and that homestead furniture for her minor children; that Sullivan conveyed said premises to Irwin; that on the day of Irwin's purchase he knew Sullivan was insolvent; that on the same day one Clyde Sullivan conveyed said premises to Irwin; that Irwin had

property to Irwin and he took possession and afterwards contracted to sell it to certain other parties and put them in possession; that said judgment is a cloud upon Irwin's title to said property that the premises were and are only worth some $1,500 or $1,600 and less than said homestead estate and said prior incumbrance, which is still unpaid, and therefore said judgment in fact never became a lien upon said property Manley and Kramer answered the bill and filed a cross bill which was answered, and there was a trial, and afterwards the trial judge orally announced his conclusions that the prayer of the bill should be granted and that the cross bill should be dismissed for want of equity. Thereupon, before any written decree had been prepared, Manley and Kramer dismissed their cross bill by leave of court. Irwin had a decree under his bill. Manley and Kramer appealed to the supreme court. They there claimed among other things that Irwin did not own the homestead estate in said land; that said divorce decree did not pass the title to said lot to Mrs. Sullivan; that the proof did not show that James Sullivan had a homestead and that the decree did not dispose of his homestead, if he had one; that there was evidence which estopped Irwin from claiming that said lot was only worth $1,500 or $1,600 and that this judgment became and remained a lien upon that property. In transferring the cause to this court, the supreme court, in Irwin v Manley, 276 Ill. 353, decided that the questions whether the evidence established a homestead in Sullivan, whether the decree of divorce conveyed said premises to Mrs. Sullivan, and whether her deed conveyed the property to Irwin could not be considered upon this record, because of admissions which the appellants made in their answer. In their reply brief appellants claimed that by their answer they did not admit that Irwin had title to lot four, but only that Mrs. Sullivan conveyed him

what title she had, but that they denied that he obtained title to Sullivan's homestead estate. The answer of appellants not only admitted that Mrs. Sullivan deeded said property to Irwin but further alleged that on or about December 31, 1911, appellants learned that other judgments were about to be entered against Sullivan and communicated such information to Irwin, and appellants and Irwin agreed upon the immediate trial of said divorce suit, and that title to said real estate should be vested in Mrs. Sullivan and Irwin, and that after the actual costs were paid and a reasonable sum paid Mrs.Sullivan as alimony said lot four should be the property of appellants and Irwin; and that this agreement was to provide for paying the reasonable solicitor's fees of appellant and Irwin (it else here appearing that said judgment was for solicitor's fees earned and to be earned by appellants); that appellants filed an answer in said divorce case for Sullivan and it was tried on January 4, 1912, "and that said C. F. Irwin on the same day obtained title to said lot as trustee for the benefit of himself and these defendants, pursuant to the above mentioned agreement and is now holding the title to said premises as such trustee." Therefore the answer did expressly admit that Irwin had the title. The cross bill was filed by appellants for the purpose of having their rights in the title to said lot established and to either be decreed part owners with Irwin or, if he had sold the same, to have an accounting with him and a decree for their share of the proceeds. The cross bill was more full in its allegations that Irwin had the title in trust. The answer to the cross bill among other things, pleaded the Statute of Frauds.

It is obvious that under the decision of the supreme court the only question left for this court to pass upon is whether appellants had an interest in said premises by virtue of said alleged agreement between themselves and Irwin. This was a

a

affirmative defense upon which they had the burden of proof. They offered no proof of any such agreement, and there is no proof thereof in this record.

The decree is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6311

2859

205 I.A. 233

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6011. Agenda 38.

Albert C. Taylor, Appellee,
-vs-
Burt Craig, Appellant.

Appeal from Circuit Court of Henry County.

Niehaus, P.J.

This is an action in assumpsit brought by Albert C.Taylor, the appellee, in the circuit court of Henry county, against the appellant, Burt Craig, to recover a balance claimed to be due the appellee for an automobile which appellee avers he sold and delivered to the appellant. The declaration consists of the common counts. A copy of the account sued on was attached, and an affidavit of the appellee's claim verifying the amount claimed to be due. The appellant filed the general issue, and gave notice of special matter of defense verified by an affidavit of merits, in which it is stated that the special matter of defense is set forth in the notice, namely; that the appellee had agreed to and did receive as payment for the automobile sold to appellee appellee's one-half interest in certain notes executed by R.E.Sloan and C.E.Opp, which are described therein; and a certain Ford automobile of the appellee, which was valued at $300.00, and delivered to the appellant, and accepted by him. And no other defense is mentioned in the pleading, or affidavit of merits.

There was a trial by jury, and a verdict finding the issues in favor of the appellee, assessing his damages at $149.. Appellant made a motion for a new trial, which was overruled,

and judgement was rendered on the verdict, from which this appeal is taken. The appellant complains because the court ruled out evidence by which he offered to show that there had been an express warranty made in connection with the sale of the automobile by the appellee, and a breach of such warranty. We are of opinion that the court properly excluded this evidence It did not come within the matters specified as a defense, by the notice and affidavit of merits filed. The appellant was limited in making his defense, to the matters set up in the notice and affidavit of merits. (Miller v.Thomas, 200 Ill. App. 125) And it may be said in this connection that the right of appellant to amend his affidavit so as to make this evidence admissible is not presented for our decision.

Appellant also contends that the court erred in some of the instructions which were given for the appellee. After careful consideration of appellant's contention in that regard we are of opinion that no error was committed, except in the giving of the instruction concerning the allowance of interest, in which the court told the jury that if they found from the evidence that the defendant unreasonably and vexatiously withheld payment of thepurchase price, less the $300. credit for the Ford automobile, that then they should include in their verdict interest at the rate of five per cent. per annum, computed on the purchase price of the car as found by them, from the time that the,purchase price was so unreasonably and vexatiously withheld, to the time of the trial. This instruction was erroneous, inasmuch as there was no evidence upon which a finding of unreasonable and vexatious delay could be based. The evidence shows that there was no delay in payment, except

on account of the defense which the appellant claimed to have to the plaintiff's demand. Appellant had the right to make the defense, though it might delay payment. This is expressly decided in Imperial Hotel Co. v Claflin Co. 175 Ill. 119, where the cupreme court say, concerning the point involved;- " The mere fact of appearing and defending a suit is not sufficient (for the allowance of interest,) because it is a right which cannot be construed into unreasonable or vexatious delay in payment, To create an unreasonable and vexatiou delay in payment, within the meaning of the statute, there must be more than mere delay in payment. To authorize a recovery for interest the debtor mustin some way throw obstructions in the way of collection by some circumvention, contrivance or management of his own, which induced the court to withhold proceedings against him longer than it would otherwise have done."

Where the amount erroneously allowed for interest can be definitely determined, the error can be cured by a remittitur; but in this case the amount allowed for interest is not ascertainable, and it is necessary, therefore, to reverse the judgment and remand the case. (O'Heron v. American Bridge Co., 177 Ill. App. 405.)

For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6326

2860

205 I.A. 235

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and seventeen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 - 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6326. General.

Martin Ringdahl,
Defendant in Error,
-vs-
Wm. O. Johnson, Receiver of the Chicago & Milwaukee Electric Railroad Company, Corporation,
Plaintiff in Error.

Writ of Error to circuit court, Lake County.

Nichaus, P.J.

This is an action commenced in the circuit court of Lake county by Martin Ringdahl, defendant in error, against the plaintiff in error, William O. Johnson, receiver of the Chicago & Milwaukee Electric Railroad Company, to recover damages for personal injuries suffered by the defendant in error in being struck by an electric car of plaintiff in error while in the act of crossing St.Johns Avenue, in Highland Park. There was a trial by jury, and a verdict and judgment in favor of the defendant in error, for $500. from which this writ of error is prosecuted.

The counsel for plaintiff in error make the following statement in their brief concerning the matters involved for decision: " The declaration and the additional count filed charge that the defendant's servants carelessly operated an electric car in the city of Highland Park; that certain ordinances were violated, and that the plaintiff was exercising due care for his own safety and therefore entitled to recover damages for the injuries sustained. It will not be necessary to more particularly set out

6326.

-7-

" the declaration or the issues involved, for the reason that we do not question the sufficiency of the declaration or make any point in the pleadings, or as to there being any variance. If the judgment of the court below can be sustained upon the evidence introduced, as to the care exercised by the plaintiff for his own safety, we make no point but what the pleadings are sufficient to support a judgment. Neither does it become important to more particularly set out the charge of negligence for the reason that we shall argue in this brief but one question, to-wit: Was as a matter of fact and in accordance with the evidence admitted, the plaintiff in the exercise of ordinary care for his own safety? While we do not admit, as a matter of fact, that the defendant was guilty of negligence, still we are willing to concede, for the purposes of this argument, that there was some evidence in the record to supportthat finding?" * * * * " Unless this court after a careful consideration of the case submitted is of the opinion that the judgment should be reversed because of a total lack of evidence in the record tending to show the exercise of due care on the part of the plaintiff, then we are willing that the judgment should be affirmed."

The tracks of the appellant in Highland Park are located on St. Johns Avenue, running north and south, and crossing Central Avenue, which is an east and west street, in the business district of the town. The tracks of the Chicago & North Western Railway Company running north and south are also located about 100 feet west of the tracks of the plaintiff in error, and also cross Central Avenue,

and there are gates at the Chicago & North Western Railroad crossing, which are operated from an adjacent tower, and upon the tower there is a bell which is rung as a signal and warning of the approach of a train from either direction, and the lowering of the gates.

The defendant in error testified that on the date day of the injury, which was August 7, 1915, he was going west, and was crossing over St.Johns Avenue, on the crossing walk on the north side of Central Avenue. Before reaching the tracks of plaintiff in error he had to cross a roadway space of about 30 feet, which was used by vehicles, and upon which autos were running north and south. After he crossed over this roadway, looking out for the autos, which were running on the street, as he reached the tracks of the plaintiff in error, just before the car struck him, his attention was suddenly direction to the bell ringing on the gate tower of the North Western Railroad, whose track he was also approaching, and the lowering of the gates on account of the approach of a train, and for an instant looked in that direction, and he did not see or hear the car which injured him, which was coming at the rate of 12 to 15 miles an hour.

It is true that he might have seen this car coming if he had looked before it reached the crossing, and apparently he did not look in the direction of the approaching car at the particular time when the car was nearing the crossing. Counsel contend that this failure to look must be considered such negligence as will bar a recovery. It has repeatedly been held, however, that a failure to look for the approach of a railroad

train is not to be considered negligence as a matter of law, and does not necessarily bar a recovery. And the question whether a plaintiff is guilty of contributory negligence by a failure to look is one for the jury. (Winn v C.C.C. & St. L.R'y. Co., 239 Ill. 132; Chicago & N.W. R'y. Co., v Dunleavy, 129 Ill. 132; Schneeweiss v Ill.Central R.R.Co., 196 Ill. App. 248)

The car which injured the defendant in error was subject to a provision of an ordinance of the city of Highland Park, which required that the cars running upon the street in question and approaching the crossing, be under the complete control of the motorman as to speed. The evidence is clear, that the car which caused the injury was not under such control. The defendant in error had a right to rely on the fact that the plaintiff in error, in running its cars, would obey the ordinance. (Tukeman v.C.C.C. & St.L.R.Co., 237 Ill. 104; Elgin City Banking Co.v C.M.& St.P.R'y.Co. 160 Ill.App.364; Elgin, J & E.R'y.Co. v Hoadley, 220 Ill. 462; I.C.R.R.Co., v Gilbert, 157 Ill. 354; Lund v.Osborn, 183 Ill. App. 63.)

The proof warranted the jury in inferring that if the ordinance had been obeyed, the accident would not have occurred. But inasmuch as the question of contributory negligence in this case is one of fact, for the jury, we should have to remand the case, even if we considered there were sufficient grounds for a reversal of the judgment.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6339

2861

205 I.A. 236

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on MAY 9 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6[illegible]9. g. 63.

Eleanor Ceser,
Defendant in Error,

-vs-

Herman Morehouse,
Plaintiff in Error.

Error to circuit court
LaSalle County.

Niehaus, J.

This is a suit in trespass and was commenced by the defendant in error, Eleanor Ceser, in the circuit court of LaSalle county, to recover damages for an assault and battery alleged to have been committed by the plaintiff in error in the city of Fargo, North Dakota; also an assault, with intent to ravish her, alleged to have been committed in LaSalle county in this state.

The plaintiff in error plead not guilty to the charges made against him in the declaration. There was a jury trial, and a verdict finding the plaintiff in error guilty, and assessing the damages of the defendant in error at $2800, for which a judgment was rendered; and from this judgment a writ of error is now prosecuted.

It is claimed by the plaintiff in error, that the weight of the evidence does not show his guilt of an assault and battery, or of the attempted assault in La Salle county charged; it is also contended, that error was committed in the instructions given by the court in behalf of the defendant in error, in which

the law of assault and battery is defined; also, that the argument of counsel for defendant in error at the close of the trial went beyond the legal proprieties of such an argument, in urging the jury to find a large amount of damages against the plaintiff in error.

Concerning the fact of the assault which is alleged, the only witnesses were the parties to the suit, and defendant in error testified that she first met the plaintiff in error in September, 1914, at the Kindred Hotel, at Valley City, North Dakota, where she was then working as head waitress; that she was at that time 19 years of age, and that after a short acquaintance the plaintiff in error proposed marriage to her, and that she finally accepted the proposal; that in about a week thereafter, about October 15, 1914, they started for Fargo, to carry into effect the proposed marriage; that they got to Fargo about the middle of the afternoon of the day on which they started; that when they got there the plaintiff in error suggested that they register as man and wife; that it would make no difference inasmuch as they were going to be married, and that it would save trouble; that they went to the Fargo House and registered as man and wife, he signing his own name on the register and she signing her name as Mrs. Herman Morehouse; that thereupon they were assigned to the same room on the second floor of the hotel, and together were shown to the room; that plaintiff in error then said he would go out and get a license to get married; that he went out and returned in a few minutes and informed her that they could not be married that day because it was too late, and then proposed going

downstairs, which they did, and thereafter went out into the town where she did some shopping, purchasing some articles of dress and wear, for which he paid; that, when they got back to the hotel they met Roy Riordan, who had come to Fargo to be a witness to their marriage, and Roy asked them if they were going to be married, whereupon the plaintiff in error said, "No"; that thereupon she asked the plaintiff in error when they were going to be married, and he said- "The first thing in the morning"; that they then went to supper, Roy Riordan having supper with them, and after supper they all went to a show, and after the show they came back to the hotel and went up to the room that had been assigned to them, Roy Riordan going to his own room, on the same floor; that after they had got into their room she insisted that the plaintiff in error go to Roy Riordan's room, but he refused to go and said: "Well, there is nothing to worry about, we are going to be married in the morning"; and that he staid and talked and finally went to bed and said; " I will not hurt you, you need not be afraid of me", and that thereupon she trusted him; that thereafter she undressed and went to bed; that as soon as she got in bed the plaintiff in error commenced assaulting her; that she struggled with him to prevent him having sexual intercourse with her until she was completely exhausted, and tired out; that in spite of her struggles he finally succeeded by using force in having sexual intercourse with her, against her will, twice during the night. She further testified that the next day they went to Moorehead (Which was across the river from Fargo) to get married; and that the plaintiff in error then informed her that he was not 21 years of age; but in order to get a license he was going to

tell the officials he was 21 years old; however, when they got to the place where licenses were issued, he said he was 19 years old, whx and thereupon the license was refused; that they then went back to Fargo and tried to get a license there, but it was refused because it appeared that the plaintiff in error was a resident of the State of Illinois, and had not lived in North Dakota for six months; that thereupon, the plaintiff in error said to her; "We might as well go home, and I will marry you as quick as we get to Mendota, as long as we have our tickets and everything bought"; and that thereupon they took the train for Mendota and rode all night, getting to Mendota the next afternoon. After spending the afternoon and evening and part of the night at Mendota, the plaintiff in error took her to his father's house, about 8 miles from Mendota, and showed her to a room which he occupied that night; that the next morning she was introduced to his parents and remained at this home until the day before the following Thanksgiving. She testified that the plaintiff in error kept putting her off about getting married from day to day and week to week, and finally informed her that his father objected; that shortly after that she left and went to workat Mendota, and at Malden; she also testified that one night while she was staying at the home of the parents of the plaintiff in error, he came into her room and got into bed with her and assaulted her and tried to force her to have sexual intercourse, but that she resisted and succeeded in preventing it.

The plaintiff in error in his testimony denied that he assaulted the defendant in error at any time, or that he ever

attempted to have sexual intercourse with her forcibly and against her will; while he does not deny the main incidents narrated by defendant in error, and admits he had sexual intercourse with defendant in error at the hotel in Fargo, he insists it was with her consent, and that there was no trouble between them concerning the matter.

It is true, that some of the circumstances in evidence apparently corroborate the plaintiff in error in his version of this affair; but the defendant in error is also corroborated by some of the admitted incidents in the case. The contest centers around the question whether or not the plaintiff in error had such intercourse with the defendant in error forcibly and against her will; and whether or not he assaulted and whether he attempted to have intercourse with her forcibly at the house of his parents in La Salle county as testified to by her.

Concerning these vital questions in the case and as to what actually occurred there are no witnesses, except the two parties, and it is clear that if the defendant in error testified to the truth concerning these controverted matters, that she undoubtedly had a right to recover; as to whether or not she told the truth the jury was in the best position to determine, inasmuch as the jury had both of the parties before them, saw them, and heard them give their testimony, and their appearance and manner of testifying, and their conduct as witnesses, were necessarily important factors in the consideration of the question as to which one was more worthy of credence.

The jury believed that the defendant in error told the truth with reference to what occurred between the parties, and the record does not disclose any legal basis for holding that the jury were wrong in their conclusion.

Under the circumstances here presented this court would not be warranted in saying that the jury should have believed the plaintiff in error instead of the defendant in error, and clearly the verdict, which had the sanction of the trial judge, cannot be considered as so manifestly against the weight of the evidence that we would be justified in reversing the case on that ground.

The complaint made concerning the closing argument of counsel for the defendant in error, we do not regard as well taken. Counsel was within his rights in arguing the question of the amount of damages, which should properly be allowed in case the jury found the plaintiff in error guilty; nor is there any error apparent in the instructions defining the law of assault and battery which were given to the jury; nor do we consider the amount of damages assessed as excessive for the wrong and injury which the jury must have found the defendant in error had sustained.

The record does not disclose any reversable error, and the judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6356

2862

205 I.A. 237

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 - 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6386. Agenda 46.

Gipps Brewing Co., Appellant,

-vs-

City of Peoria, Appellee.

Appeal from Circuit Court of Peoria county.

Nichaus, P.J.

This is a suit by the Gipps Brewing Co., appellant, brought in the circuit court of Peoria county against the City of Peoria, appellee, for damages which appellant claims that his property in the city of Peoria sustained because the appellee cut down the surface level of a part of Garden street to build a permanent sidewalk; also sustained by the cutting down of the level of Ligonier street, which intersects Garden street at this point. There was a trial by jury, and a verdict for appellee, upon which judgment was rendered, and from the judgment this appeal is taken.

It appears from the evidence that the appellant is the owner of the property in question, which is a lot situated on the corner of Garden and Ligonier streets, and acquired the title to these premises on February 21, 1913. The city of Peoria in 1903, adopted an ordinance fixing the grade of Garden street, by which the natural surface was lowered about four and one-half feet, and shortly afterwards it cut down the level of the street roadway to conform to the grade established, but that part of the street constituting the sidewalk remained intact

until October, 1914, and at that time the city also cut down this portion of the street to the level of the grade established by the ordinance of 1903, and constructed a permanent sidewalk. Appellant, of its own volition, thereupon cut down the level of the ground of Ligonier street, and built a permanent walk to conform to the level of the sidewalk built by the city, which left the remaining part of Ligonier street higher than the surface of the sidewalk so constructed by the appellant. The city afterwards remedied this condition, by cutting down the remainder of Ligonier street.

At the time the permanent grade of Garden street was established by ordinance the lot in question was vacant; but in the fall of 1908, about five years after the establishment of the grade in question, the then owner of the lot moved a building upon it. In setting it on the lot he did not adjust it to conform to the grade, which had been established by the ordinance, but set it on the lot to conform to the natural level of the ground. In setting the building and adjusting it for use and occupancy a cellar was built under it, and the necessary foundations and a cess-pool were also built and connected with the building; other improvements were made at that time, and connected with the building. When the city cut down the street next to the building to conform to the grade for the sidewalk, it resulted in leaving the building about four and one-half feet higher than the sidewalk level, and thereby rendered it more difficult of access; and it became necessary for proper use and enjoyment of the premises by the occupant to lower the building and re-adjust it to conform to the sidewalk level, and it also

became necessary to re-construct the cess-pool, to deepen the cellar, and re-build the foundation; also to renew a large part of the plumbing, which had been designed and put in the building in its former position. These re-adjustments and re-constructio involved an expense of about $1000.

It is a well settled rule of law that a city, in making street improvements, such as lowering the grade of a street, is liable for damages which may thereby result to the owner of the property abutting on such street. (Beidler v Sanitary District, 211 Ill. 628; Springer v City of Chicago, 138 Ill. 552; City of Chicago v Jackson, 196 Ill. 511; City of Bloomington v Pollock, 141 Ill. 346; Village of Grant Park v Frah, 218 Ill. 516.) And the character and measure of damages which may be recovered for damaging private property in making a public improvement have been clearly defined by the supreme court in Springer v The City of Chicago, 135 Ill. 522, in these words: " Where an action is brought to recover damages, wher no part of the plaintiff's property has been taken, but merely damaged, by a public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the constructions of the public improvement. In other words, if the fair cash market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had."

And more recently, in the case of Beidler v Sanitary District, 211 Ill. 628, the court says - " Where property has been

"damaged though not taken by a public improvement, and the damag are of such a character that a recovery may be had, the measure of damages is the difference in value of the property before the improvement was constructed and the value after the improvement was completed." See also, Peck v Chicago Rys.Co. 270 Ill.34. The trial court in this case properly adhered to the rule above stated. And the real contention involved here is whether the damages claimed were of such a character that a recovery could be had for them; and also whether any such damages were in fact proven.

The damages shown by the evidence in this case are such as resulted from the re-adjustment of the building to conform to the grade which had legally been established by the city prior to the time that the building was placed upon the premises. The law requires the owner of a lot abutting upon a street to take notice of the permanent grade which has been fixed by a city ordinance, and to make the permanent improvements which he places upon a lot conform to the grade established. (City of Denver v.Vernia, 8 Colo. 390.) Our attention has not been called to any Illinois case in which the point involved here has been considered or decided, but in the case cited the question under consideration was directly passed upon. The court says:- " It is unnecessary to consider the question whether the establishing of such a grade and carefully reducing the street thereto would present such a case of injury to the abutting low owners who had purchased property on the street and erected improvements thereon before such grade was established; but with reference to an existing grade, previously fixed by ordinance, and the street

" reduced thereto, for no such case was here made out. The grade was fixed by the proper authorities, long before the plaintiff's purchase of the property, although the street had not been lowered thereto. It was the plaintiff's duty to have inquired of the proper city officers, before his purchase, what the change was, when, if found objectionable for the purposes to which he desired to appropriate the property, he could have chosen a more eligible site- especially was it his duty to have ascertained the grade before erecting his improvements. To say in the face of the city ordinance that he was justified in relying upon certain acts and appearances, that the then existing grade was the fixed and permanent grade, is a proposition that cannot be entertained. He must be presumed to have known what the established grade was when he purchased, and to have purchased with reference thereto. He must also be presumed to have known what this grade was when he erected his improvements, and to have built with reference thereto."

We are of opinion, therefore, that the appellant is not entitled to recover for the cost incurred in re-adjusting his buildings to the grade which had been legally established before the building was placed there. It is evident, also, that the appellant would not have any right to recover damages, which may have resulted from its own voluntary act of cutting down the level of Ligonier street for the sidewalk which it constructed thereon. But aside from all this, the jury were warranted in drawing the conclusion from the evidence that the market value of the premises was not diminished by the improvement made by the city. The jury therefore properly found the

issues in favor of the appellee.

No error is apparent in the instructions of the court, nor in its rulings on the evidence. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2863

205 I.A. 239

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 17 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6390. Agenda 73.

Samuel H. Tinsman,
Appellee,
-vs.-
The Independent Harvester Company,
Appellant.

Appeal from Circuit Court,
Kendall County.

Niehaus, P.J.

This is a suit in assumpsit, brought by Samuel H. Tinsman, appellee, against the Independent Harvester Company, appellant, in the circuit court of Kendall county, on a non-negotiable promissory note. There was a trial by the court, and a finding in favor of the appellee for the amount of the note and interest amounting to the sum of $1515, for which judgment was rendered against the appellant; and the appellant prosecutes this appeal.

The declaration consists of a special count on the note in question; also the common counts; and to raise the issues to be tried the appellant pleaded the general issue and five special pleas, alleging, in various ways, that the note in question had been given to acquire certain supposed patent rights from the appellee for the manufacture and sale of an improved cultivator, the improvements being inventions claimed to have been made by the appellee, and that after the execution of the note there had been a total failure of consideration for the note because the patented inventions of the appellee turned out to be infringements of other prior patents.

-1-

The evidence shows that the appellee, claiming to have invented certain new and useful improvements in a certain cultivator and about to apply to the government patent office for letters patent covering such inventions and improvements, on the 9th day of November, 1909, entered into a written contract with the appellant, a manufacturing corporation, which was desirous of acquiring the exclusive right for the manufacture and sale of the improved cultivator in question; and the contract recites the fact that the appellant was desirous of obtaining the improvements and patents of the appellee, and stipulates that the appellee should prosecute applications for patents, and that when the same would be granted and issued, that at the request of the appellant he was to assign them to the appellant, together with all his interest therein, and the appellant agreed to pay all expenses necessarily incurred for securing the patents in the United States, as well as in foreign countries; and that when such patents were issued by the United States and transferred to appellant, in consideration thereof it would issue to appellee twenty-five shares of its machinery preferred discount stock; also pay him at the same time the sum of $500, in cash, and execute seven notes, payable to the appellee, each for $1000, bearing six per cent interest, one of these notes to mature each year thereafter.

The appellee agreed on his part that he would transfer and assign to appellant all right to the improvements for which letters patent were issued. And it was further agreed that in case the appellant failed to comply with the contract

mentioned the patents were to revert to the appellee.

After this contract was entered into the appellee on November 15th,1909, filed his application for a patent in the patent office at Washington, and the claims of appellee for a patent were afterwards allowed, and a patent was issued on March 14, 1911. After the application for a patent was filed, and before the claims of appellee for a patent had been allowed, the appellant, by virtue of its contract with appellee, commenced to manufacture and sell the cultivators in question, which it made in accordance with the improvements claimed by the appellee, and continued in such manufacture and sale for about three years thereafter, increasing the number manufactured and sold each year, and then ceased the manufacture and sale thereof, claiming that appellee's patented inventions were infringements of prior patents held by other persons.

In the latter part of the year 1910, after the appellant had commenced the manufacture and sale of the cultivators in question, and before the issuance of the letters patent by the government, to appellee, a man by the name of Houston made a claim that the improvements for which appellee was trying to get a patent were infringements on prior patents which he had obtained. An investigation was made of this claim by the parties in interest, and it was concluded that the Houston claim was not warranted, and thereafter nothing further appears to have been done either by Houston or any one else concerning this matter.

The claim made by Houston, however, resulted in the making of an addition to the agreement already entered into by the parties, and this additional agreement which was entered into recites the fact of the previous agreement having been made by appellant to acquire the title to the appellee's patent right, and that upon the conveyance of the title thereto to appellant there would become due and payable to appellee certain considerations mentioned in said previous contract, a part of which would be the making of the several promissory notes mentioned; and that whereas the appellant was desirous of guarding against all contingencies which might arise concerning infringements in that the cultivatore of appellee might be held and adjudged to be an infringement on previously existing letters patent, it was therefore agreed that if in any suit or suits which might be brought for infringement it should be held and adjudged that the manufacture of the cultivator in question would be an infringement, that then and in that event any notes outstanding which the appellant had given the appellee and which were not then due and payable, should be deemed canceled, and of no force and effect; also that in furtherance of the stipulations made in said additional contract, such notes to the appellee should be made non-negotiable. And the notes, when given, were made non-negotiable, as provided in the additional contract.

The appellant also agreed in the additional contract to defend any suit which might be brought for infringement of the letters patent that might be issued to appellee, and to pay all

expenses thereof until the lower court should have determined that the appellee's cultivator was an infringement, and that when the lower court had decided that the cultivator in question was an infringement the notes mentioned given to appellee, which had not become due, were to be deemed canceled. The agreement also provided that if there were a decision of the lower court that the invention in question was an infringement, and the appellant should decline to further prosecute or defend such suit by an appeal, and insist that the notes should be canceled, then the appellant would desist and refrain from the further manufacture and sale of the invention.

The appellant contended in the court below and contends on this appeal, that there was a failure of consideration of the note in question because the patent right furnished by appellee gave no monoply of any feature of value in the machine which appellee put forward as the subject matter of sale; also that the machine as a whole, and especially as to its salient and valuable features, gave the appellant no monoply by reason of the patents furnished by the appellee, and that it was barred from its use by reason of prior patents not within the control of the appellee, and which prior patents had claims dominating the features in the appellee's machine, which were most valuable to appellant.

Whether appellant acquired a monoply by appellee's patent turns upon the other question raised in the case, namely: whether appellee's patented improvements were in fact in-

fringements of other patents. The rights of the parties concerning the matter of infringement, however, were clearly fixed by the additional contract, which, like the original contract, was entered into in reference to the acquisition by the appellant of appellee's patent rights, and the assignment of such rights to the appellant, and is governed by the same consideration, and this additional contract must be considered in the same light as if it were a part of the original contract. And it is clear under this latter part of the agreement of the parties, that the matter of infringement of a prior patent or patents, could not be made a legal basis of defense to the note in question unless such infringement was adjudicated by the judgment of a court. It seems apparent also, as a matter of law, that the appellant, who had acquired appellee's patent rights and in effect had become the owner thereof, and had profited by such ownership, and was, and apparently is still, in the possession and control of such patent rights, could not rightfully defend against the consideration to be paid therefor on the ground that some one claimed there was an infringement, even if the evidence disclosed that such a claim had been made. And the evidence does not show that any person holding a prior patent for the improvements embraced in appellee's patent made any claim for infringement after the assignment to appellant; or that any person prevented the appellant from continuing in the full enjoyment and exploitation of its ownership of the patent rights involved.

But assuming that the appellant, under the circumstances here presented, had the legal right to refuse to pay the note in question because, as a matter of fact, appellee's patented inventions were infringements, it is evident that such a defense,

under its special pleas, would have to be established by a preponderance of the evidence; and the record does not disclose that there is a preponderance of evidence showing an infringement. To sustain its defense in this respect, the appellant called as an expert witness a mechanical engineer who had knowledge of the matters involved, and had been employed for several years in the United States patent office as a member of the examining corps, and his evidence tends to show that most of the improvements and devices claimed to have been invented by appellee were substantially covered by other prior patents issued to other parties. Later in the trial, appellee, on the same question, also called an expert witness who appears to have been equally well informed concerning the controverted matters, and in addition thereto had extensive practical experience in the operation of cultivators, and the inventions made concerning them, and this expert testified, in effect, that the improvements embraced in appellee's patent were not infringements of any other patent; and pointed out how, in the practical operation of the cultivator in question, the improvements claimed to have been invented by appellee were in fact distinctive and different from those described in the other patents.

On the face of the record, therefore, appellant had no preponderance of the evidence on the question of infringements but the preponderance is apparently against its contention. And we must assume that the trial court found that the appellant failed to sustain its special pleas by a preponderance of the

evidence; so that, even if the defense, as alleged, was legally effective, it was not established by the evidence.

For the reasons stated we are of opinion that the trial court properly found the issues for the appellee.

Appellant also assigns as error the admission in evidence of a copy of the note sued on, instead of requiring the production of the original. No objection was made in the court below to the introduction in evidence of the copy. The original would have been the best evidence, but in the absence of any objection to the introduction of the copy because it was a copy, the production of the original was not necessary; and the appellant is not in position to object for the first time in this court because the court admitted the copy instead of the original in evidence. Inasmuch as the note is non-negotiable, when the copy was offered there was nothing involved except the question of its competency as evidence, and the appellant was not harmed by the fact that the original was not produced and filed in the case.

No reversible error is disclosed by the record, and the judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6466

2867

205 I.A. 241

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and seventeen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 17 1917

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6466. Ag. No. 48.

CITY OF MOLINE, Appellant,
-vs-
GUSTAF JOHNSON, Appellee.
} Appeal from Rock Island.

PER CURIAM.

Gustaf Johnson sued the City of Moline, and filed a declaration counting on an injury sustained by the plaintiff by reason of a defective street of the defendant's, and averred "That within six months from the date of the said injury, or when the said cause of action accrued, and on to-wit: the twenty-ninth day of April, A.D.1910, he filed in the office of the city attorney and also in the office of the city clerk of the said City of Moline, a statement in writing, signed by him, giving the name of the person to whom such cause of action accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician." The defendant plead the general issue, and a special plea denying that it had possession or control of the location in question. The trial resulted in a judgment on a verdict of $4000. for the plaintiff. The city prosecutes this appeal and assigns on the record about all the errors that could be committed by a court and jury, but no bill of exceptions is incorporated in the record, and a reversal is asked on the ground that the above statement of notice to the defendant is imperfect and incomplete, and would be treated as an entire

failure to plead the notice to the city required by the statute, and therefore appellant insists the court was without jurisdiction to render a judgment against the city.

It is true that the plaintiff had no right of recovery unless he gave the statutory notice, and averred and proved that fact. He attempted to comply with the statute by averring notice in the language of the act. Whether this was good and sufficient pleading we are not called upon to say. We express no intimation that it was not. It was at least a defective averment of the notice required, and in the absence of demurrer, motion for a new trial, or motion in arrest, and of anything on defendant's part to call the attention of the court below to the question, the declaration was certainly good after verdict.

The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____ in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

290 - 22245

CITY OF CHICAGO,
Defendant in Error,

vs.

EDWARD ERICKSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

205 I.A. 242

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was found guilty and fined $50 for making a disturbance and committing an assault in violation of the city ordinances. There was no testimony to support the charge except that of the complaining witness, a woman who went to his office to solicit work as a scrub-woman in a building of which he was head janitor. Every statement of hers tending to show any conduct on his part that would support the charges was flatly and directly denied by him, and the physical circumstances were seemingly more favorable to the defendant. There is nothing in the record to indicate that the parties were not of equal credibility, and his character was supported by the testimony of several men of business prominence who had known him for many years. The burden of proof was on the city to establish the charges by a preponderance of evidence. Under such circumstances we do not feel that the charges were proven. Broughton v. Smart, 59 Ill. 440. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

elix of [illegible],

Deferment in favor,

as.

[illegible] welcome,

[illegible] in favor.

MEETINGS AND NOTICES OF THE COURT.

Mr. Pomphrey Smiley Plaintiff

Plaintiff in error and Plaintiff and Plaintiff in error

for making a disturbance and committing an assault in
violation of the city ordinances. There was no testimony
to support the charge except that of the complaining witness,
a woman who went to his office to solicit work as a servant-
maid in a dwelling of which he was head janitor. Each
statement of here tending to show each claimed on his part
that would support the charges and directly
denied by him, and the physical circumstances more reasonably
more favorable to the defendant. There is nothing in the
record to indicate that the petition were not of equal
credibility, and its character was affected by the testimony
of several men of business reputations who had known him for
many years. The decision of [illegible] was on the city to establish
the charges by a preponderance of evidence. Under such
circumstances as to not feel that the charge were proven.
Reversed and the cause remanded.

Decision A. Cart, 22 Ill. 442. The judgment will be

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305 - 22260

205 I.A. 243

SYDNEY WALKER,
Defendant in Error,

vs.

CHARLES HILLAND,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Walker brought suit to recover damages for injury to his automobile from collision with Hilland's automobile. At the time of the collision the former was driving his car south on a north and south street and the latter had just turned north on said street after coming from the west on an intersecting street. The collision took place about thirty feet north of the intersection near the west curb of the north and south street. Defendant reached the point of intersection first and in the usual course of driving had the right of way and should have crossed the north and south street to the east side thereof. He took a short turn, however, claiming that he was forced to do so by reason of plaintiff's fast driving on the east side of the north and south street and suddenly over to the west side. Plaintiff claimed that he was all the time on the west side of the street and was forced to the west curb to avoid a collision with defendant's car by reason of defendant's wrongfully taking a short cut north on the same side. The testimony was conflicting. While it is difficult to say whether the court reached a correct conclusion in finding that the collision was wholly due to defendant's negligence yet

without the same opportunity of seeing and hearing the witnesses that the trial court had we are unable to say that its conclusions are manifestly against the weight of the evidence.

The court assessed the damages at $355 but the testimony in support thereof was unskillfully presented and is somewhat unsatisfactory. The plaintiff testified that the radiator, front axle, wheels, the engine and crank shaft were the principal parts of the car damaged, and another witness said the lamps were smashed. Plaintiff introduced a bill that he paid for the repairs of the car which included repairs on those parts and some others. The person who superintended all of the repairs except the repair to the radiator, testified as to the reasonable cost thereof, which amounted to about the same as the sum so billed and paid. We do not think the case should be sent back for a new trial if a remittitur is made to an amount that can be fairly ascertained from competent evidence to be the reasonable cost of such repairs as were necessary. Taking the evidence as a whole, we think it clear that excluding from the amount of the paid bill the cost of repairing the radiator, and the cost of the tube and "sundry small parts" which were not testified to, the evidence will support a judgment for $298.31. If there be a remittitur to that amount within ten days from the filing of this opinion the judgment will be affirmed for that sum, otherwise the case will be reversed and the cause remanded for a new trial.

AFFIRMED ON REMITTITUR.

331 - 22286

205 I.A. 244

CORA B. HINTZEL,
Defendant in Error,

vs.

ANNIE BALL,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a suit brought for the value of services rendered as an attorney. The only two points argued were that the verdict is not sustained by the evidence and that the hypothetical question put to the expert witnesses as to the value of such services was improper. We find no reversible error in allowing said question. That plaintiff rendered the services for which she sought to recover and that there was no express agreement as to the amount of the compensation and that there was an implied contract that defendant would pay the usual and customary fees for such services can hardly be questioned. Most of the services referred to were rendered in securing an abandonment of proceedings before the Board of Local Improvements under a resolution to pave an alley back of defendant's premises which she claimed was her private property. It is unnecessary to detail the several conferences and consultations had and steps taken by plaintiff in successfully securing an abandonment of the proceedings. She sued for $1,000 and recovered a verdict for $600. Two experienced attorneys testified that such services were worth from $800 to $1,000. No evidence to the contrary was introduced. It is assigned as error that the judgment is

excessive and while the testimony of plaintiff's witnesses tends to sustain the amount of the verdict the court is not bound by such testimony but can, and should, take into consideration its own knowledge of the value of such services. Gentleman v. Sanitary District, 260 Ill. 317. We have carefully examined the testimony relative to the nature of the services performed and the amount and character of the labor they required in connection with the benefits they were intended to secure, and think under the circumstances that a charge of more than $500 therefor might well be deemed excessive. If, therefore, defendant in error will within ten days from filing of this opinion remit $100 the judgment will be affirmed with costs against plaintiff in error, including those for additional abstract. Otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

334 - 22289

ALEXANDER LIPS and BENJAMIN F. NYSEWANDER, Jr., by J. L. NYSEWANDER, his next friend,
Plaintiffs in Error,

vs.

ANTON J. CERMAK, Bailiff of the Municipal Court and ANNA L. McCOID,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 246

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Lips and Nysewander, Jr., were plaintiffs in a proceeding for trial of right of property levied on by the bailiff of the Municipal Court of Chicago under an execution in favor of said McCoid. The evidence adduced in support of the claim of plaintiffs in error to the property showed that the property in question was an automobile taken in exchange for real estate owned by Lips. The transaction was negotiated by Nysewander and the automobile was left in his possession to sell, with the agreement between him and Lips that he was to have all he realized from the sale thereof over $1150 as compensation for his services in the transaction.

The mere contract right to sell it did not give Nysewander the standing of a claimant in such a proceeding. It gave him no property right in the automobile, but simply an interest in the proceeds of the sale thereof provided they exceeded $1150. His right of possession thereto as against Lips is beside the question at issue. The question in such a proceeding, as contemplated by the statutes per-

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Va.

taining thereto, is whether the property belongs to the claimant so that it cannot legally be taken on an execution (Hurd's R. S. 1916 Ed. Ch. 1400, Sec. 10; Ch. 79, Art. 13, Sec. 4); or, as stated in the Municipal Court Act (Sec. 48a), whether the claimant is "entitled" to it. In whatever court the proceeding is brought, the purpose is the same, namely, to determine the right to the property as against the levy. If this proceeding had been brought by Lips alone the property would, without other evidence, have been awarded to him; but it could not, under the said state of facts, be awarded to both plaintiffs and, therefore, the action could not be maintained by them jointly. The court could not voluntarily dismiss Nysewander out of the case, hence it properly, on defendants' motion, dismissed the suit for misjoinder of plaintiffs in accordance with the general rule applicable where there are too many plaintiffs. Starrett v. Gault et al., 165 Ill. 99. See also Cottingham v. Armour Packing Co., 109 Ala. 421; Railroad Co. v. Linder et al., 39 Ill. 433; Brady v. Koontz, 145 Ill. App. 582.

AFFIRMED.

354 - 22309

THEOFILA GALEWSKI,
Appellee,

vs.

GLOVER LEAF CASUALTY COMPANY, a corporation,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

205 I.A. 247

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against an insurance company in an action brought upon an accident insurance policy on account of the alleged accidental death of the deceased husband of appellee. Most of the points urged for reversal relate to the sufficiency of the evidence and are predicated on a motion for a new trial as recited in the clerk's transcript. As it is not made to appear in the bill of exceptions, those points can not be considered. Yarber v. Chicago & Alton Railway Co., 235 Ill. 589; Pate v. Blair-Big Muddy Coal Co., 252 Ill. 198. In this state of the record the only points left open for consideration are whether the motion to direct a verdict at the close of all the evidence should have been sustained and whether there was error in the admission of certain evidence and in a remark of the trial judge. We shall not dwell upon the first point as there was unquestionably evidence that required submission of the case to the jury; nor upon the second, as the third requires reversal.

The main controverted fact was whether the death of the insured resulted from an injury to the internal

ear caused by the accident or from a pre-existing disease therein. It appears that the insured came to his death from an infection in the internal ear in which the pneumococcus germ was present. Appellant claimed that such an infection could not be caused by an external injury such as was sustained in the accident, and appellee claimed that blood flowed from the ear of the deceased at the time of his accidental injury, and that such an infection might start from any kind of a wound that will produce blood. The question of liability hinged on whether the ear trouble antedated the accident. Plaintiff's evidence on that subject was mainly of a negative character, to the effect that the witnesses never knew of such a trouble, and when objection was made by appellant to a question whether a certain witness knew "of deceased having any trouble with his ears," the court remarked:

> "Here is a man who testifies that he saw him once a week. Supposing somebody who was in the hospital and who had opportunity to see him every day testified that he did not know of any sickness, would not that testimony be as strong as the direct testimony that he was not sick? It all depends on the opportunity the witness had of seeing and knowing the condition. If the circumstances were such that he could testify that he did not see, when he naturally would have seen these things if they existed, it seems to me that negative testimony is as strong and direct and conclusive as positive and direct evidence would be."

When the statement was excepted to the court added, "it might, under certain circumstances," -- which hardly seemed to remove the impression the remark was calculated to convey to the jury, namely, that negative evidence was as strong and conclusive as positive evidence to the contrary. Appellant offered direct and positive evidence that the insured had an internal ear trouble for a considerable time prior to the accident, and expert evidence that it was chronic and developed into a septic

condition that caused his death. The testimony of several of plaintiff's witnesses on that subject was negative to the effect that they had never known of his having such an ear trouble. The remark of the court bore directly upon the value of such evidence so far as to encroach upon the province of the jury to determine its weight. The remark was particularly prejudicial as it related to the decisive fact at issue, namely, whether plaintiff's death ensued from an injury received from the accident or from a diseased condition that antedated it. We are forced to the conclusion that the remark was so prejudicial as to call for a reversal of the judgment and a remanding of the cause for a new trial.

REVERSED AND REMANDED.

376 - 22331

EDWARD D. MACK,
Appellee,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LIMITED,
Appellant.

205 I.A. 234

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit upon a certain accident insurance policy issued by appellant to appellee. The case was heard by the court without a jury and resulted in a finding and judgment in favor of appellee for $810.00 and costs. Liability under the policy was not disclaimed but it was contended at the trial, as it is here on appeal, that appellee (plaintiff below) was injured in doing an act or thing in an occupation classified as more hazardous than that stated in his application for insurance and that therefore his claim should be prorated in accordance with the classification in which he was employed when injured.

There is no question that under the policy the rate of premium was based upon the occupation of the assured and that if the insured was injured either after having changed his occupation to one classified by the corporation as more hazardous than that stated in the policy, or while he was doing any act or thing pertaining to any occupation so classified, the corporation was liable to pay only such portion of the indemnities provided in the policy as the

EDWARD P. MACE,

Appellee,

vs.

[illegible]

[illegible]

[illegible]

premium paid would have purchased at the rate for the more hazardous occupation.

In his application, which was made a part of the policy, the insured represented his occupation as being the proprietor of a certain saw mill whose business was that of lumber, and that the duties of such occupation were "office duties and traveling, supervising not superintending." The policy came under class 3 of the form known as the "Gaflac Accident" and was issued with reference to classifications and rates as shown by a schedule in a manual issued by the corporation. The classifications therein are based on occupations minutely specified and variously classified apparently with reference to their hazardous nature. There is no classification in the manual with phraseology precisely like that designated in the application. Under the heading therein of "Lumber Mills or Yards" is the designated occupation "Prop'r. or Mgr., mill, office duties, not superintending" which is classified as "B 2 Preferred". The application for insurance probably falls, and liability is claimed, under this classification. Under such heading are enumerated various other classifications, such as "Prop'r. or Mgr. mill supt'g only" classified as "C 3 Ordinary"; "Salesmen in Yard" "C 3 Ordinary"; "Foreman in Lumber Yard", "D 4"; "Log Scaler or Lumber Counter", "C 3" and "Superintendent", "C 3" etc. etc. The limit of risk varies according to the occupation.

The plaintiff testified that he had just come into the yard and climbed up a pile of timbers for the purpose of measuring lumber, and that while climbing down he slipped, and his right hand was thrown into a planer, resulting in the amputation of his fingers. He stated that he had no other man for that purpose. Others testified not only to

his measuring, straightening up and pulling over and loading lumber but that he performed certain duties which correspond to that of superintending, - that "he was the boss there", that "he was around there most of the time directing the men at different kinds of work." Under the most favorable construction to be placed on that kind of work, which he did not deny doing, and the doing of which in any event was established by a preponderence of evidence, his occupation fell under that of a proprietor superintending instead of supervising his work, and hence made him under the policy entitled to indemnity in the class designated as "Ordinary C 3" which costs $8.50 per $1500, principal sum. The insured paid a premium of $25 which would, therefore, purchase under that form of policy in that classification $4500, principal sum, and entitle him to $15 per week for total disability. The court's findings were on the basis of total disability for six weeks and a half total for fifty-two weeks and surgeon's fees for $10. Computed according to the classification under which the occupation of the insured brought him he would be entitled to an indemnity of $466 instead of $810, and to a judgment for that amount.

In view of these conclusions it is unnecessary to review errors assigned in rulings upon evidence and the court's refusal to hold as law certain propositions submitted as such. Nothing would be gained in sending the case back for a new trial and we will enter such judgment here as the court should have entered upon the evidence heard, thereby giving plaintiff the benefit of the most liberal construction of the policy.

REVERSED AND JUDGMENT HERE.

376 - 22331.

FINDINGS OF FACT.

We find that appellant, General Accident, Fire & Life Assurance Corporation, Ltd., insured Edward D. Mack, appellee, under a certain accident policy indemnifying him against an accident received while engaged in the occupation of proprietor of mill with office duty and not superintending, and that he was actually engaged in superintending work in said mill prior to and at the time of said accident, and that under the rates provided for in said policy for the occupation of proprietor or manager of mill, superintending only, the indemnities provided for in the policy at the premium paid by appellee, for the injuries sustained, by him, would purchase the sum of $466.

385 - 22340

205 I.A. 235

AMERICAN TRUST & SAVINGS BANK, a corporation,
Appellee,

vs.

A. BAUER DISTILLING & IMPORTING COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was entered for the amount due on a promissory note and protest fees against the maker and endorser thereof. This appeal is by the maker only, a corporation chartered to buy and sell liquors, etc.

The defenses pleaded are that the note is ultra vires the corporate powers of the maker and that it was issued as accommodation paper, and the evidence offered in support thereof shows that it was not given for products which appellant was incorporated to deal in, and that it was in fact given to take up a like note apparently given for accommodation. But there was no evidence to impeach the good faith of appellee which received the same before maturity, without notice of any infirmity, in the usual course of business for value either by discounting the same or in payment of a like note - which, does not definitely appear.

Because the vice-president of appellee was also a director of the corporation for whose benefit the note or

the one it replaced was negotiated, and thus became cognizant of the purposes for which it was drawn and negotiated, it is urged that appellee took the note with notice of its character and want of power to execute it. The knowledge of such officer acquired not while acting in his official capacity for the bank but casually and through his individual relation to such other corporation, would not be chargeable to the appellee bank. (Fisher v. Murdock, 13 Hun. 485; Willard v. Denise, 50 N. J. Eq. 483; Merchants Natl. Bank v. Clark et al., 139 N. Y. 314.) Besides it appears that such officer was acting at the time in his own interest and not that of the bank. (Seaverns v. Presbyterian Hosp., 173 Ill. 414.)

There can be no question that the corporation had the power to execute notes for purposes incident to the transaction of its business, and as said in Daniel on Negotiable Instruments (6th Ed.) Sec. 386, "Where a corporation has a general power, express or implied, to be a party to bills and notes, such instruments will be presumed to have been executed in the legitimate course of business, and whether so executed or not will be valid in the hands of bona fide holders without notice."

As the note was given to take up another note of appellant, it can not be said to have been without consideration, as argued; and even though the latter was an accommodation note previously negotiated to or discounted by the bank in the usual course of business without notice of its real character, the payment thereof by the note in question, also taken without notice as aforesaid, would not deprive the bank of its position as an innocent purchaser for value. (Wolf v. Bank of Commerce, 107 Ill. App. 58.)

The cost of the protest fees was not put in issue by defendant's affidavit of merits, and hence we need not

discuss the points made as to the proof thereof. The judgment will be affirmed.

AFFIRMED.

232 - 22186

JOSEPH SHADAUSKI, otherwise known as Joseph Schultz,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 257

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant, Joseph Shadauski, sued defendant, the Chicago Railways Company, in an action on the case, to recover damages for personal injuries alleged to have been received through the negligence of the defendant. The trial resulted in a verdict of not guilty, upon which judgment was entered against plaintiff for costs, to reverse which this appeal is prosecuted.

The gravamen of the charge against the defendant is substantially as follows: that defendant's foreman, one Coughlin, placed a ladder against the side of a street car in defendant's barn, and directed plaintiff to climb up and get on top of the said car, for the purpose of replacing a broken trolley pole thereon; and that while plaintiff was stepping from said ladder to the roof of the said car, the said Coughlin "negligently, carelessly, improperly and unskillfully caught hold of the broken trolley pole and pulled it down with a sudden and violent jerk, in such a manner as to cause the car to rock to and fro," causing the ladder upon which plaintiff was standing to slip and fall; by reason whereof plaintiff was thrown therefrom and injured.

The evidence shows that plaintiff had been employed by defendant as a car repair-man for about eight (8) years

prior to the accident, and that in the discharge of his duties, he was required frequently to go upon the roofs of cars to make repairs, necessitating the use of a ladder.

Plaintiff testified that just prior to the time of the accident, the said Coughlin told him to hurry and put a new trolley pole on the car in question; that in pursuance of said order, he immediately went to get his wrenches; that during this interval the said Coughlin put a ladder against the side of the car in question and went upon the roof thereof; that when he (plaintiff) returned, Coughlin said, "Now come on, Joe, hurry up and get the car ready;" that he (plaintiff) climbed up the ladder and "got about two steps from the top of the car" and put his tools on the roof thereof and climbed on another step, and Coughlin "take the pole from the hook and leave it loose upon that car, and that pole come shaking on the north side, the ladder slipped off and I fell down."

Plaintiff further testified that "Coughlin took hold of the pole with both hands and took it off the hook and tried to raise it up. * * * The ladder shook when Coughlin loosened the pole from the hook and raised it up. * * * The ladder slipped at the bottom. * * *

Q. He didn't let loose of the pole - let it fly up?

A. Sure it was loose - have to leave the pole.

Q. You mean he unhooked it and let it fly?

A. Oh, no.

Q. He let go the hook and let it go up easy, did he?

A. Yes, sir."

No complaint was made regarding the condition of the ladder furnished by defendant, or the manner in which it was placed against the car. Neither was it contended that the foreman gave plaintiff a negligent order. The sole

prior to the accident, and that in the discharge of his duties, he was required frequently to go upon the roofs of cars to make repairs, necessitating the use of a ladder.

Plaintiff testified that just prior to the time of the accident, the said Coughlin told him to hurry and put a new trolley pole on the car in question; that in pursuance of said order, he immediately went to get his wrenches; that during this interval the said Coughlin put a ladder against the side of the car in question and went upon the roof thereof; that when he (plaintiff) returned, Coughlin said, "Now come on, Joe, hurry up and get the car ready;" that he (plaintiff) climbed up the ladder and "got about two steps from the top of the car" and put his tools on the roof thereof and climbed on another step, and Coughlin "take the pole from the hook and leave it loose upon that car, and that pole come shaking on the north side, the ladder slipped off and I fell down."

Plaintiff further testified that "Coughlin took hold of the pole with both hands and took it off the hook and tried to raise it up. * * * The ladder shook when Coughlin loosened the pole from the hook and raised it up. * * * The ladder slipped at the bottom. * * *

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Q. You mean he unhooked it and let it fly?

A. Oh, no.

Q. He let go the hook and let it go up easy, did he?

A. Yes, sir."

No complaint was made regarding the condition of the ladder furnished by defendant, or the manner in which it was placed against the car. Neither was it contended that the foreman gave plaintiff a negligent order. The sole

negligence relied upon was the manner in which the foreman handled the broken trolley pole, viz., "he pulled it down with a sudden and violent jerk, in such a manner as to cause the street car to rock to and fro," causing the ladder to slip and fall.

From the foregoing, it is obvious that plaintiff's evidence wholly failed to sustain this charge of negligence, but on the contrary it tends to show that the said Coughlin was free from any negligence in handling the broken trolley pole which he and the plaintiff were about to replace.

In this view of the case it becomes unnecessary to consider the other assignments of error.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

249 - 22203

205 I.A. 258

HORACE H. STODDARD,
Appellant,

vs.

ILLINOIS IMPROVEMENT & BALLAST COMPANY, a corporation, and H. C. GREER,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action of forcible entry and detainer brought by appellant (plaintiff below), for the possession of certain premises. Two trials were had. The first, which was before a justice of the peace, resulted in a finding for the plaintiff, whereupon an appeal was taken to the Circuit Court, and upon a trial de novo, the court held that the aforesaid action would not lie. By this appeal it is sought to reverse the judgment of the Circuit Court dismissing plaintiff's action.

Plaintiff, who was the owner of a certain farm near La Grange, Cook County, Illinois, leased a portion thereof to Bales and Sons for quarrying purposes, for a period of ten (10) years, commencing January 2, 1903, "and as long thereafter as the property is suitable for quarrying purposes," and reserved as rent therefor the sum of six cents (6¢) per yard of 27 cubic feet or 2500 lbs., for stone removed. In August, 1905, the said lessees assigned their interest in said lease to one Myron J. Carpenter, who in turn assigned his interest therein to the Illinois Improvement & Ballast Company, one of the defendants herein.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action of interpleader filed and instituted by defendant Plaintiff Brown, for the possession of certain premises. The facts were these. The first, which was before a justice of the peace, resulted in a finding for the plaintiff, whereupon an appeal was taken to the District Court, and upon a trial de novo, the court held that the proceedings action would not lie. By this appeal it is sought to reverse the judgment of the District Court dismissing plaintiff's action.

Plaintiff, who was the owner of a certain farm near La Grange, Cook County, Illinois, leased a portion thereof to Jules and Sons for agricultural purposes, for a period of ten (10) years, commencing January 1, 1924, "and as long thereafter as the property is suitable for agricultural purposes," and reserved to said lessors the sum of six cents (6¢) per yard of 27 cubic feet or 4500 lbs., for stone removed. In August, 1927, the said lessees assigned their interest in said lease to one Count 1. Chapman, who in turn assigned his interest thereto to the Illinois Improvement & Building Company, one of the defendants herein.

It is admitted that the property in question is suitable for quarrying purposes and that prior to December 6, 1910, the date of the last assignment of the said lease, large quantities of stone were quarried and removed from the aforesaid premises, for which the lessor received royalties approximating $12,000; that defendant, the Illinois Improvement & Ballast Company, has neither quarried nor removed any stone, nor paid any rent for the said premises since the lease was assigned to it.

The sole question presented here is, whether or not an action of forcible entry and detainer will lie for this breach.

The lease in question contains no express covenant requiring the lessees to quarry any definite amount of stone. There is merely an implied covenant that the lessees will quarry stone with reasonable diligence if found, and so long as found in quantity and kind that may be quarried at a profit to the lessees. Stoddard v. Illinois Improvement & Ballast Co., 275 Ill. 199. But the breach of an implied covenant will not work a forfeiture of the lease, the only available remedy for such a breach being an action for damages. Poe v. Ulrey, 233 Ill. 56; Harris v. Ohio Oil Co., 48 N. E. Rep. 502.

The trial court therefore properly held that an action of forcible entry would not lie. Accordingly the judgment will be affirmed.

AFFIRMED.

287 - 22242

LOUIS FENDL and W. C. VIRKUS, co-partners, doing business as Fendl & Virkus, Defendants in Error,

vs.

GEORGE J. COOKE COMPANY, a corporation, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

205 I.A. 259

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendants in error (plaintiffs below), brought an action against the George J. Cooke Company, to recover moneys claimed to be due them under a certain written contract, and for damages alleged to have been sustained by plaintiffs, as a result of a breach thereof by the defendant. The trial resulted in a verdict and judgment against defendant for $275.00 and costs, - which defendant by this writ of error seeks to have reversed.

During the fall of 1913, plaintiffs embarked in the saloon business in the city of Chicago. The negotiations incident thereto culminated in the making of the following contract between plaintiffs and the defendant:

"Chicago, Ill., Oct. 27th, 1913.

Geo. J. Cooke Co.,
30 No. Green St.,
Chicago.

Gentlemen:

In consideration of your installing saloon fixtures in my premises at 3405 Ogden Ave., we hereby agree to handle and sell your keg beer exclusively from the first day of November, 1913, to the first day of November, 1915, and in the event of our failure so to do, we hereby deposit with you the sum of $250.00, which we hereby agree is the cost of installing said fixtures and plumbing.

"Chicago, Ill., Dec. 27th, 1918.

Geo. W. Crain Co.,
  St Be. Green St.,
    Chicago.

Gentlemen:

In consideration of your replacing asbestos
fixtures in my premises at 1436 Green Ave., so thereby
more to handle and melt your own beer economically
from the first day of December, 1918, to the first
day of December, 1919, and in the event of any failure
so to do, we hereby commit with you the sum of $100.00,
which we hereby agree is the cost of installing new
fixtures and pipings.

Signed:

Witness:

All fixtures and plumbing are to remain the property of the George J. Cooke Company and to be returned to them on demand, and to be insured for their reasonable value while in my possession or control.

Upon our faithful compliance with the foregoing agreement and the performance of all other covenants of a certain contract entered into this day between the George J. Cooke Company and ourselves said amount of $250.00 is to be returned to us on the first day of November, 1915, with interest at five per cent.

LOUIS WOHDL
W. C. VERKUS."

On the same day, the parties hereto entered into another contract, by the terms of which the plaintiffs agreed to purchase from the defendant an aggregate of one thousand (1,000) barrels of beer of various brands therein designated, to be delivered during the period between November 1, 1913 and November 1, 1915.

Plaintiffs continued in their saloon enterprise for about six (6) months, and on May 11, 1914 notified defendant to remove its fixtures from the aforesaid premises. Accordingly the fixtures were removed by defendant.

Plaintiffs' statement of claim alleged a full performance by them of all the provisions of both contracts; a breach by defendant of the contract relating to the installation of fixtures; and that defendant rescinded and abandoned both of said contracts on May 1, 1914.

The evidence adduced on behalf of the plaintiffs tends to prove that although there were some objections to the fixtures furnished by defendant, yet with the aid of them plaintiffs were enabled to carry on their business. There is an intimation that plaintiffs' business suffered as a result of defects in the fixtures furnished them by the defendant, but there is no evidence in the record from which it appears, either directly or inferentially, that plaintiffs'

business was in anywise impaired because of any alleged defects.

While the statement of claim avers that defendant rescinded both its contracts with plaintiffs, we find nothing in the evidence to substantiate this allegation. On the contrary, the evidence shows that plaintiffs discontinued their business on or about April 30, 1914, because of their failure to procure a license for the ensuing six-months' period, and not because of any breach of contract by defendant.

Defendant contends that the conditions upon which it agreed to return the $250 were not complied with by plaintiffs; that so far as the contract itself was concerned, plaintiffs could recover back the money only upon proof that they had purchased defendant's beer from November 1, 1913 to November 1, 1915.

From an examination of the record and of plaintiffs' brief, it is evident that plaintiffs' right to a recovery was based solely upon defendant's alleged breach of contract in furnishing imperfect fixtures to the plaintiffs. The contract expressly provided that this money ($250) shall become payable only in the event plaintiffs should, during the period therein specified, purchase their beer exclusively from defendant, in the quantity therein set forth. Obviously, the fulfillment of this contract by plaintiffs was a condition precedent to a right of recovery of this deposit, proof of which was indispensable. (Olmstead v. Distilling & Cattle Feeding Co., 77 Fed. 265.) The evidence offered on behalf of plaintiffs is utterly lacking in this respect. It shows, at most, that the fixtures furnished by defendant were in some respects defective. These shortcomings, however, cannot be taken advantage of by plaintiffs to strengthen their case, but their right to a recovery must be based upon a fulfillment

by them of their contract. They having failed therein, the judgment must be reversed.

In this view of the case, we find it unnecessary to consider the other points raised by defendant.

REVERSED.

325 - 22280

GLENRIDGE COAL COMPANY, KNOWLTON L. AMES, THOMAS C. LOUCKS,
Complainants - Appellants,

vs. Bill

MARION COUNTY COAL COMPANY,
Defendant - Appellee.

- - - - - - - - - - - - - - -

MARION COUNTY COAL COMPANY,
Cross Complainant - Appellee,

vs. Cross Bill

GLENRIDGE COAL COMPANY, KNOWLTON L. AMES, THOMAS C. LOUCKS,
Cross Defendants - Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 264

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery filed by the Glenridge Coal Company, Knowlton L. Ames and Thomas C. Loucks, for an accounting and damages against the Marion County Coal Company, for an alleged breach of contract.

In addition to its answer to the bill of complaint, defendant filed a cross bill wherein it sought to recover a balance of $8,000 alleged to be due it from the Glenridge Company for coal sold and delivered. Upon a hearing, the bill of complaint was dismissed for want of equity and the decree herein complained of was entered on defendant's cross bill.

Defendant owned and operated a coal mine at Glenridge, Illinois. The aforesaid contract, bearing date March 11, 1914, provided that the Glenridge Company should, for a period of two (2) years commencing April 1, 1914, have the exclusive right to sell the output of defendant's mine;

No. 3211

Complainants - Appellees,

vs.

Defendant - Appellee.

Cross Complainant - Appellee,

vs.

Cross Defendants - Appellants.

This was a suit in chancery filed by the Illinois Coal Company, Decatur, Illinois, for an accounting and damages against the Macon County Coal Company, for an alleged breach of contract.

In addition to its answer to the bill of complaint, defendant filed a cross bill wherein it sought to recover a balance of $8,000 alleged to be due it from the Illinois Company for coal sold and delivered. Upon a hearing, the bill of complaint was dismissed for want of equity and the decree upon defendant's cross bill.

Defendant owned and operated a coal mine at Elmridge, Illinois. The electricity generated by the Macon County Electric Company, hereinafter referred to as the Illinois Company, for a period of two (2) years commencing April 1, 1914, was the current utilized for mining purposes. The defendant's mine was equipped with electric machinery and the Illinois Company undertook to furnish sufficient power to operate the same. The defendant's mine was located about two miles from the Illinois Company's power house, and the current was transmitted from the power house to the mine by means of a transmission line. The defendant's mine was equipped with electric machinery and the Illinois Company undertook to furnish sufficient power to operate the same. The defendant's mine was located about two miles from the Illinois Company's power house, and the current was transmitted from the power house to the mine by means of a transmission line.

defendant reserving the right to sell to customers within a radius of twenty-five (25) miles of its mine, railroads excepted. The said contract also contained a clause fixing the proportion of the profits to be due each party on all sales made thereunder as well as the minimum amount of coal which the Glenridge Company was obligated to purchase from the defendant. The payments were to be made as follows:

> "The said party of the second part (the Glenridge Company) further covenants and agrees to pay to the said party of the first part for all coal purchased and shipped by the said party of the first part at Centralia, Illinois, in Chicago exchange, on its semi-monthly pay days, as fixed from time to time by said party of the first part, said remittance to be made so as to reach said party of the first part on the semi-monthly pay days which occur at present on the Saturday nearest the 15th and 30th of each month.
>
> "And the said party of the second part also at the same time and in the same manner, agrees to pay to the said first party its share of said profits for all coal shipped during the preceding half month."

Attached thereto was a guarantee in writing, executed by the complainants Knowlton L. Ames and Thomas C. Loucks, which was in words and figures as follows:

> "For value received, and as an inducement for the said Marion County Coal Company to accept the foregoing contract we hereby guarantee all payments to be made and all covenants and agreements to be performed by the said Glenridge Coal Company as set forth in the foregoing contract, shall be paid, kept and performed by the said Glenridge Coal Company at the time and in the manner as therein set forth, hereby waiving all notice of default in the same."

The parties entered upon the performance of the said contract and continued to operate thereunder until October 31, 1914, when the defendant notified the Glenridge Company that it had decided to cancel its contract, at which time the following letter was sent to the latter company:

> "In your contract with this company, dated March 11, 1914, among other things, it is provided as follows: (here follows the provision hereinabove quoted)
>
> "You have repeatedly violated the foregoing provisions of said contract and notwithstanding your attention has been called to these violations re-

peatedly, you have continued to ignore them. On your remittance due June 15, 1914 you were in arrears .....$4,380.12, On your remittance due July 11, 1914, you were in arrears..... 9,386.86, On your remittance due August 15, 1914, you were in arrears..... 4,380.12, On your remittance due September 12, 1914, you were in arrears..... 2,783.10, and on your remittance due today, you are in arrears something over 700.00

"In view of the foregoing, we have determined to cancel your contract and you are hereby notified that your contract with this company, bearing date March 11, 1914, is hereby cancelled and terminated."

Issues having been joined, the cause was referred to a master in chancery for hearing, who in his report found, inter alia, that at the time of the cancellation of the said contract, there was due to the defendant from the Glenridge Company the sum of $7,842.86, and recommended that a decree for that amount be rendered in favor of the defendant, and that complainants' bill be dismissed for want of equity. The master's report was adopted by the court and a decree entered in accordance with the recommendations therein contained.

The paramount question presented here for review is, whether or not the defendant was justified in abrogating the aforesaid contract.

It appears from the contract itself and from the facts and circumstances in evidence, that it was imperative that the Glenridge Company remit promptly as provided by the contract, to enable the defendant to meet its pay rolls twice per month; and that the Glenridge Company had practically the exclusive agency for the sale of defendant's coal, so that the defendant had to rely upon regular remittances from the latter company in order to continue its mine in operation. Clearly, therefore, time was of the essence of this contract.

The evidence shows that the Glenridge Company, from the inception of the contract, failed on each occasion to make the payments in full as provided for in the contract, with

the exception of the pay day nearest the middle of the month of October, 1914; that defendant, through its officers, protested vigorously against the irregularity of these payments; that letters and telegrams were frequently sent, and that defendant's officers made several personal calls, demanding payment as per contract; and that the Glenridge Company had on several occasions promised to comply therewith in the future; that on the 31st day of October, 1914 the Glenridge Company's semi-monthly remittance was short upwards of $700, at which time the defendant canceled its contract.

In view of the foregoing, there can be no question that under the contract, the Glenridge Company was required to make semi-monthly payments, so that the remittance for coal shipped during the first fifteen days would reach the defendant on the pay day nearest the last day of such month, and the remittance for coal shipped during the last half of the month would be received on the pay day nearest the fifteenth day of the succeeding month; the obvious purpose thereof being to enable the defendant to make up its semi-monthly pay roll. Inasmuch as time was of the essence of this contract, and the Glenridge Company having repeatedly breached its contract in this respect, it must be held that the defendant was justified in canceling same because of the former's failure to make payments in accordance therewith.

Nor can it be successfully contended that by continuing the contract in force, defendant had waived all past breaches. The evidence shows that these alleged waivers were conditioned upon the future fulfillment of its contract by the Glenridge Company, and it having failed therein, the breach was revived.

It also appears that at the time of the filing of

the bill of complaint, the Glenridge Company was indebted to the defendant in a sum upwards of $7,000, for coal delivered during the latter half of October, 1914, which it refused to pay.

It is a well settled rule of law, that an action for damages for breach of a contract cannot be maintained where the complaining party is in default. Penn. Coal Co. v. Ryan, 107 Ill. 226; Hess v. Dawson, 149 Ill. 138; Harber Bros. v. Moffatt Cycle Co., 151 Ill. 84; Purcell Co. v. Sage, 200 Ill. 342; L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.

We are therefore of the opinion that the court properly dismissed the bill of complaint for want of equity. Accordingly the decree will be affirmed.

AFFIRMED.

337 - 22292

LOUIS F. A. HEDRICH,
Defendant in Error,

vs.

UNITED STATES BREWING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 266

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Louis F. Hedrich, plaintiff below, recovered a judgment against the United States Brewing Company for $198.79, to reverse which this writ of error is prosecuted.

Plaintiff leased to the defendant certain premises in the city of Chicago, for a period of one year, beginning May 1, 1915, and reserved as rent therefor the sum of $1,500, payable in monthly installments of $125 each in advance. The lease in question, - which was drafted by the lessee - provided inter alia that said lessee should have the right upon the forfeiture of said lease or at the expiration of the term therein demised, to remove all plumbing, water closets, urinals, bath tubs, iron fountains etc. installed by the lessee. Clause 6 thereof provided that the said lease was made upon the express condition that the City of Chicago would issue a license to conduct a saloon business in said premises, and that in the event of its refusal so to do or should it revoke a license theretofore issued, the lessee reserved the right to terminate the lease by giving ten (10) days' notice in writing. Clause 9 of said lease provided as follows:

"In case the building or buildings on said premises or any part thereof shall, at any time, be destroyed or damaged by fire or other casualty so

> that the same shall be unfit for occupation or use, then the rent hereby reserved shall cease to be payable while the same are unfit for occupation or use, and so continue until said premises shall be rebuilt by said lessor or made fit for occupation and use; or in case said premises are totally destroyed or are not put in tenantable condition within thirty days from the time of said damage, then at the election of the lessee, upon notice given, the term hereby created shall cease and determine. Said lessee reserves and has the right to terminate this lease at any time by giving the lessor ten days' notice of its intention so to do."

After procuring a city license, the lessee went into possession and opened a saloon on the ground floor of the demised premises, and sublet the upper floors.

On October 19, 1915 the lessee served a written notice on the lessor, to the effect that it had elected to cancel the lease in question, and that it would yield possession of the demised premises on or before October 31, 1915. Accordingly the premises were vacated, and defendant removed therefrom certain fixtures, plumbing, etc., which it claimed to have installed therein.

The principal question presented for determination, is whether or not by the terms thereof, the lessee had the right to terminate the said lease at any time upon giving the lessor ten (10) days' notice.

In construing the said lease, the whole instrument must be considered and so construed, if possible, as to give force and meaning to every part thereof. (Hayes v. O'Brien, 149 Ill. 403.) Doubtful, ambiguous or inconsistent reservations or conditions inserted therein will be given a construction which is least favorable to the party drafting same. Massie v. Belford, 68 Ill. 290; Mueller v. N. W. Univ., 95 Ill. App. 258.

Applying this rule of construction to the lease in question, it is obvious that if under clause 9 supra the lessee had the unconditional right to cancel the lease at

any time upon giving ten days' notice, as contended for by the defendant, then the provision in clause 6 giving the lessee the right to cancel the lease in the event of a revocation or the refusal by the authorities to issue a license, becomes superfluous; the latter being included in the former. If the position of the defendant were tenable, then no force or effect could be given to that clause of the lease which demised the premises for a period of one year, and consequently the lease would become determinable at the will and pleasure of the lessee.

In view of the foregoing, the only reasonable construction that can be given to the ten-day cancellation provision of clause 9 supra is that the lessee may terminate the lease upon ten (10) days' written notice in the event the said premises are totally destroyed by fire, or are not put in tenantable condition within thirty days from the time they are damaged by fire. Richmond v. Brandt, 118 Ill. App. 624.

One of the issues raised, was the ownership of certain property which the defendant removed from the demised premises, the value of which was included in plaintiff's judgment for damages.

Upon the trial, plaintiff introduced evidence to the effect that he owned and had installed the property in question. The defendant offered countervailing evidence tending to prove that it had installed the said property, to which plaintiff objected and the court sustained the objection.

In view of the fact that the value of the property in question was included in plaintiff's claim and constituted a part of the judgment for damages, the defendant clearly had the right to introduce evidence on this issue, and the

refusal thereof by the trial court therefore constituted reversible error, for which the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

261 - 22215

LEFMAN & MEGGIE, a corporation,
Plaintiff in Error,

vs.

THE INTER-STATE PRODUCE COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

205 I.A. 270

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought a suit in attachment to recover the difference between the contract price and the market price of two cars of turkeys. A special appearance was entered by the defendant and a motion made to quash the attachment writ on the ground that it appeared from plaintiff's affidavit for attachment that the claim was for unliquidated damages. The court sustained the motion, and it was ordered that the defendant go hence without day. Plaintiff asks this court to reverse this judgment.

It is the settled law of this state that an original attachment will not lie to recover unliquidated damages. Capes v. Burgess, 155 Ill. 61; Steele-Wedeles Co. v. Shoodoc Pond Packing Co., 153 Ill. App. 576.

Are the damages sought to be recovered in this case liquidated or unliquidated? The affidavit alleges that on December 3, 1915, the plaintiff bought a car of turkeys, to contain 20,000 pounds of the grade designated as dry-picked, dry-packed and packed in barrels separate, at a price of 20 cents per pound f.o.b. Chicago, delivery to be made on or before December 8th; that on December 13th the car of turkeys arrived in Chi-

cago, but were rejected by the plaintiff on the ground that they were not dry-picked, dry-packed and packed in barrels separate; that they were frozen turkeys and inferior to the kind and quality of the turkeys purchased, and that the market price on December 15th was 22 cents per pound.

Damages are said to be liquidated where they can be determined from the contract itself, or from the contract and the rules of law applicable thereto. Where it is necessary to introduce evidence before plaintiff can prove his case, the damages are said to be unliquidated. Applying this test to the affidavit in question, we think it is manifest that plaintiff would be unable to prove his case without the introduction of evidence. Obviously there might be a difference of opinion among witnesses as to whether the turkeys offered were dry-picked and dry-packed; whether they were frozen or merely chilled, after having been in the refrigerator car for several days; also whether such turkeys were inferior to picked and packed turkeys; and as to whether it was possible to ship them from Texas to Chicago without freezing them. It is also probable that witnesses might differ as to the market price in Chicago on any certain day.

The affidavit also alleges the purchase of another car of the same number of pounds, designated as dry-picked and dry-packed, at the price of 20 cents per pound, for "Young Toms" and "Young hens," and 18 cents per pound for "Old Toms." In addition to the uncertainties above indicated there is also here uncertainty as to the market price in Chicago of the grade of turkeys known as "Old Toms"; nor does the affidavit allege how many pounds of "Old Toms" there were in this car.

We hold that the affidavit discloses a claim for unliquidated damages. Cases somewhat similar are Higbie v. Rust, 211 Ill. 333; American Laundry Machine Co. v. Barr, 176 Ill. App. 519, and the Steele-Sedeles Co. case supra, opinion by Mr. Justice Dibell of the Second District, wherein the facts are very similar to those in the instant case and the reasoning of the court peculiarly applicable.

It is also suggested that the affidavit contains no allegation as to the market price in Chicago on December 8th, which is the date of the breach of the contract. We should think this was necessary. It has been many times held that on a breach of contract for failure to deliver commodities, the measure of damages is the difference between the contract price and the market value of such articles at the time they should have been delivered. Sleuter v. Wallbaum, 45 Ill. 43.

There is no merit in the point that because defendant is a nonresident the plaintiff should be allowed to maintain an action against it for unliquidated damages. This has never been the law in this state; the cases cited by plaintiff's counsel are not in point.

The order quashing the attachment was right and the judgment is affirmed.

AFFIRMED.

332 - 22766

H. S. GILE GROCERY COMPANY, a corporation, et al.,
Appellees,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 272

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In a suit to recover damages for failure of the defendant to deliver a shipment of canned corn in good order, upon trial by the court plaintiffs had judgment for $284.50 from which defendant appeals.

The evidence tended to show that on December 4, 1911, the P. Hohenadel Jr. Canning Company delivered to the defendant at Rochelle, Illinois, 1,000 cases of canned corn; the defendant was the initial carrier; the car was consigned to the "order of P. Hohenadel Jr. Canning Company, notify H. S. Gile & Co., Salem, Oregon, c/o California Atlantic Steamship Co. at New York." The routing of the car was to be via the defendant to its junction with the Erie railroad in Chicago, thence by the Erie to Long Dock in the North River. Whether Long Dock is on the New York or Jersey City side of the North River is not clear, but we do not think this is important. From Long Dock the shipment was to be carried by the California Atlantic Steamship Company to Portland, Oregon, thence to destination at Salem, Oregon.

The shipment was delivered at Long Dock on December 10th, which the evidence shows is a reasonable time for transportation from Rochelle. The "Arrival Notice Clerk"

employed by the Erie Railroad, testified that on December 11th he mailed a notice of the receipt of the shipment to the California Atlantic Steamship Company in New York. Apparently this notice was not received. The car containing the corn seems to have been overlooked, and remained on the dock until about February 28th or 29th, 1912, when the clerk of the Erie Railroad personally delivered notice to the Steamship Company of the arrival of the car. The cases were then unloaded from the car to the dock, where they remained until March 18th; they were then delivered to a steamer of the California Atlantic Steamship Company. During all this time no notice was given either to the consignor or consignee of the delay in the shipment. The car ultimately arrived at Portland, Oregon, and was delivered at that point to the consignee. Upon arrival at Portland the cases were opened and the goods inspected, and there was abundant evidence that a large number of the cans were spoiled and many of them rusted and unsalable; the rusted cans required considerable work and labor in "reconditioning" them. There was also evidence tending to show a decline in value.

We are of the opinion that the points urged by defendant's counsel are met by the fact that under the bill of lading, which is the contract of the parties, defendant undertook to notify the H. S. Gile Grocery Company, c/o the California Atlantic Steamship Company in New York, upon arrival of the shipment at that point, which undertaking was not performed. It needs no argument to sustain the contention that leaving the car on the dock at New York from December until March of the following year, without notice to either the consignor or the consignee, was a breach of the contract of the carrier. It is apparent from the testimony of the witnesses that the car was entirely overlooked or lost

by the agents of the defendant, and for any damages resulting to the plaintiffs through this delay the defendant is liable.

We are of the opinion that there was sufficient evidence to justify the amount awarded as damages. The amount of the judgment is less than one-half the amount shown by the itemized statement in plaintiffs' statement of claim and which the evidence tended to prove. We are unable to ascertain just what items the trial court allowed, but the amount found is fairly within the scope of the evidence.

The judgment was right and is affirmed.

AFFIRMED.

340 - 22774

C. W. MOYER,
Appellee,

vs.

WALDEN W. SHAW LIVERY CO.,
a corporation,
Appellant.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

205 I.A. 273

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff's automobile collided with an automobile belonging to the defendant; plaintiff brought suit to recover damages for the injury to his automobile, alleging that the collision was caused by the negligence of the driver of defendant's car. Upon trial by a jury judgment was entered in favor of the plaintiff for $256 from which defendant appeals.

The accident occurred about midnight on January 26, 1915. Plaintiff was in his car, which was driven by a chauffeur; it was running east on 35th street in Chicago. 35th street crosses the point at which South Park avenue connects with Grand boulevard. As plaintiff's car came into the line of South Park avenue defendant's car, coming from the north, ran into it; after the first collision they seem to have come together again before they were stopped.

As to whether the accident was caused by the negligence of defendant's chauffeur, and whether plaintiff's chauffeur was guilty of contributory negligence, were questions of fact which the court properly left to the jury to determine. It is impossible for the reviewing court to determine with any certainty as to the respective speed of

the cars; the testimony is widely at variance. If we should believe some of the plaintiff's witnesses, his car was going about eight miles an hour, while defendant's taxicab was going thirty miles an hour, or even more. If we believe the defendant's witnesses, the taxicab was going about seven or eight miles an hour and plaintiff's car was going thirty or thirty-five miles an hour. In this situation we are compelled to leave the matter to the judgment of the trial court and jury, who saw the witnesses and were better able to judge of the reliability of their respective stories than are we. We are not able to say that the jury should not have found that the defendant was guilty of the negligence charged and that plaintiff was innocent of contributory negligence.

Points of defense are presented based upon the fact that the chauffeur driving plaintiff's machine did not have a license, and that plaintiff's car moved across a boulevard at a higher rate of speed than six miles an hour. As to the first point it is sufficient to say that the lack of a license was not shown to have had any causal connection with the accident. This also is true of the alleged crossing of a boulevard in excess of the statutory limit of speed. The violation of any ordinance or statute is not ordinarily negligence per se but only one of the elements to be considered; in any event, such violation, to be material, must be shown to have had a causal connection with the accident.

There was no error in permitting a witness to testify from a transcript of his stenographic notes, in an attempt to impeach another witness.

Some of the instructions, standing by them-

selves, might be subject to criticism, but considered as a connected series we think the law was properly given to the jury.

There is no merit in the suggestion that the driver of plaintiff's automobile was not at the time in the employ of plaintiff but in the employ of a garage company. Plaintiff's chauffeur had been assigned as a driver for plaintiff for that evening, and was therefore in the employ of plaintiff.

We hold that the testimony as to the damages justifies the amount of the verdict; testimonywas given as to items which aggregate more than the judgment.

There is no substantial reason to reverse, and the judgment is affirmed.

AFFIRMED.

360 - 22794

STERNE AND RALEY CO.,
a corporation,
Appellee,

vs.

TOM CHAMALES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

205 I.A. 275

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment obtained by the plaintiff against him, upon trial by the court, of $535.79.

It is with some difficulty that we can ascertain the points in controversy. Briefs for both sides do not follow the rules of this court with reference to the composition of briefs, and are written in such a way as to afford very little assistance to the court.

The suit seems to have been brought to enforce the liability under section 18 of the act concerning corporations, chapter 32 Hurd's Illinois Statutes. This provides that if any person pretending to be an officer, etc., shall assume to exercise corporate powers, or use the name of any such corporation or pretended corporation, without complying with the provisions of the act, before all stock named in the articles shall be subscribed in good faith, he shall be liable for all debts made by him and contracted in the name of such corporation.

We hold that it is shown by the evidence that it was proposed to form a corporation, named the Rich Laundry Company. The defendant subscribed for 75 shares of stock, and at a meeting of stockholders was elected vice-president and treasurer. On November 11, 1911, the secre-

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tary of state issued a charter to this company, but it was not filed for record in the recorder's office of Cook County, where the principal place of business of such laundry was located, until April 24, 1913. It is shown that plaintiff delivered merchandise to this company between July 1 and December 13, 1912; the suit is brought to recover for this merchandise.

These facts, which are not in dispute, bring the case clearly within section 18, supra. No very clear reason is presented by counsel for defendant as grounds for reversal. The delivery of the goods and merchandise to the company was not denied by the affidavit of defense or otherwise. The president of the alleged company admitted the purchase and receipt of the goods, giving as his excuse for nonpayment that the company had no money to pay, as the defendant, Chamales, had gotten all of the money out of the company that there was. There was abundant evidence that the defendant personally participated in the business and contracted obligations.

Other points suggested by counsel for defendant, as we understand them, afford no reason for reversing the judgment.

In American Laundry Machinery Co. v. Thomas Chamales et al., No. 21529, opinion filed December 27, 1916, some of the questions here presented are discussed by Mr. Presiding Justice O'Connor; what is there said applicable to the instant case is adopted by this court.

There being no sufficient reason to reverse, the judgment is affirmed.

AFFIRMED.

371 - 22805

ANNA RICHERT, Administratrix of the Estate of Albert Richert, deceased,

Appellee,

vs.

VILLAGE OF NILES,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 283

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $1,200 in an action to recover damages for the death of Albert Richert, alleged to have been caused by the negligence of the defendant in knowingly permitting a certain public highway within the limits of the village, known as Milwaukee Road, to be in an unsafe condition of repair so that it was not reasonably safe for public travel.

It is alleged that on April 4, 1913, Albert Richert was riding on a wagon, drawn by a team of horses and driven by another person, when one of the wheels of the wagon dropped into a hole in the road, causing Richert, a boy 15 years of age, to be thrown from the wagon, thereby sustaining physical injuries from which he died.

Milwaukee Road is a public thoroughfare, running through the Village of Niles in a southeasterly and northwesterly direction. In the vicinity of the village are truck farms, one of which is owned by Adolph Romnhack, who was a brother-in-law of Albert Richert. Young Richert had been helpin Romnhack in and about the truck farm for three or four days before the accident. At 3:20 o'clock on the morning of April 4th the two of them started from Romnhack's

farm with a wagon load of about 50 sacks of onions, weighing about 70 pounds each. The wagon was a large, open box wagon, with springs in front and rear, and a seat in the front, the top of which was about five feet from the ground. They were sitting on the seat, Romnhack on the right side and Richert on the lefthand side; Richert held a lantern in his hand, and there was another lantern on the left side of the wagon. It was a dark night; Romnhack says that he could see he was in the middle of the road but could not see the sides. While moving along Milwaukee Road within the village, the front wheel went down into a hole up to the axle, followed by the hind wheel. Romnhack saw the lantern which had been held by Richert fall down in front of the wagon between the horses, and go out, and Richert apparently fell off the seat at the left side of the wagon. He stopped his team within a distance of 6 to 12 feet, got down off the wagon and found the boy lying on the left side of the wagon, a little to the left and front of the hind wheel. The boy at this time was apparently lifeless; he was taken to a doctor's office and pronounced dead; his neck had been broken.

There was abundant evidence as to the presence and character of the hole. The jury could properly believe that it was from 12 to 18 inches deep, and about the same width. We have no difficulty in concluding, under the circumstances, that the boy did not jump off, but was thrown or fell off; there would be no occasion for him to jump off the wagon, and it is an entirely reasonable inference that the sudden jolt of the wagon dropping into a hole of this depth would cause him to lose his balance and fall. The involuntary dropping of the lantern would also indicate that this

points. For the purpose of showing conditions which are in dispute it has been held competent to prove conditions immediately or shortly after an accident. City v. Dalle, 116 Ill., 386; Harder Luse & Co. v. Leary, 35 Ill. App. 420; C. C. C. & St. L. Ry. Co. v. Doerr, 41 Ill. App. 530.

Criticism is made of instructions given by the court at the request of plaintiff, and also of the court's refusal of some of the instructions offered by the defendant. While some of the former instructions may be open to criticism, we cannot say that they could mislead the jury. Taking all of the instructions, both for the plaintiff and the defendant, the law was given to the jury with substantial accuracy. Under the manifest facts of this case we are not able to say that either the giving of these instructions or the refusal of those offered by the defendant could have had any possible influence upon the jury tending toward a different verdict.

Counsel for each of the parties have presented the case clearly and in great detail, but in its essential elements it is simple. The fundamental questions of care on the part of the deceased for his own safety, and the negligence of the defendant, were amply supported favorably to plaintiff by the greater weight of the evidence, and the judgment will not be disturbed.

AFFIRMED.

378 - 22812

WILLIAM BILLOS and GEORGE THANOS,
Appellees,

vs.

JOSEPH F. KOZLOWSKI,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 285

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to have reversed a judgment against him for $853.28, in a case tried by the court. There is not much dispute about the facts. On April 1, 1914, the plaintiffs entered into a lease, as lessees, with one Frank Janda for a moving picture theater, the term of the lease being from May 1, 1914, to April 30, 1919, rental $125 per month. They deposited with Janda $1,000 under a provision of the lease which is as follows:

> "The parties of the second part have, upon the execution of this lease, deposited with the party of the first part, the receipt of which is hereby acknowledged, the sum of one thousand ($1,000) dollars, to be held by the party of the first part as security for the payment of the rent herein reserved to be paid; and it is hereby agreed that in the event of default in the payment of the said rent by the parties of the second part, the sum of one thousand ($1,000) dollars shall be forfeited to the lessor as liquidated damages for such default; otherwise, the same shall be held and applied on the rental of the last year of the term hereof, or of any extension of the term hereof; and it is further agreed that the party of the first part shall pay to the parties of the second part interest upon the said sum of $1,000 at the rate of five and a half (5½) per cent per annum, said interest to be applied toward the payment of rent for the last month of each and every year of the term hereof."

Afterwards, and while the plaintiffs were still in possession of the premises, Janda sold and conveyed the property to the defendant, Kozlowski, and assigned the lease and also turned over to him the $1,000 deposit. Subsequently,

in March, 1916, there was some dispute as to the rental, the defendant claiming $125, and plaintiffs asserting that they had had some understanding with their old landlord, Janda, that it should be less than this. Suit was commenced for possession, and on April 1, 1916, judgment was entered against the plaintiffs and they vacated and surrendered on April 7, 1916. This suit was brought to recover the deposit of $1,000, less defendant's damages and outlays, which plaintiffs alleged to be only $145. The defendant claimed that he had sustained large damages by reason of the default in payment of the rent, and also that the $1,000 deposit under the terms of the lease was forfeited to him as liquidated damages.

Is the defendant entitled to retain the entire sum of $1,000 as liquidated damages? We hold that he is not. The provision in the lease with reference to this sum describes it as "security for the payment of the rent herein reserved to be paid." There is also a provision that it "shall be forfeited to the lessor as liquidated damages."

The courts have frequently been called upon to determine from similar provisions whether the deposit is a penalty or liquidated damages. What has been said in these many cases is comprehended in the general statement appearing in 1 Underhill on Landlord & Tenant, 583, where the author says:

> "Money which has been deposited by the tenant in the hands of the landlord, or some other person, and which by the express terms of the lease is described as a deposit as security for rent, or for the performance of some other covenant of the lease, will, as a rule, be regarded by the courts as a penalty merely and not liquidated damages. It is always immaterial that it is called liquidated damages or that it is provided that the deposit shall be forfeited as liquidated damages. Particularly is this true when the only breach of covenant by the lessee is the breach of the covenant to pay rent and the deposit is out of all proportion to the rent due. It is by no means difficult to ascertain

> the legal damages suffered by the lessor where the lessee neglects and refuses to pay rent and, for that reason, is dispossessed."

This is precisely applicable to the case before us; to compel the tenants to forfeit the entire amount of $1,000 for the nonpayment of a month's rent would be unconscionable; the element of reasonableness is an important factor in determining whether or not a deposit should be considered as a penalty or otherwise, and if the forfeiture would be unreasonable courts ought to decline to apply the entire deposit as liquidated damages. We are of the opinion that the $1,000 deposit was simply as security, and that plaintiffs are entitled to recover it less the amount which the defendant may be entitled to hold in compensation for damages. The evidence shows that after plaintiffs were dispossessed the defendant was able to re-rent the premises.

Under the terms of the lease plaintiffs were entitled to 5½ per cent on their deposit, and the trial court properly allowed this amount; and an allowance of $201.72 was made to the defendant for rent and court costs in the forcible detainer suit. Defendant insists that he should be allowed for many other items, including attorneys' fees of $500. We see no reason to disagree with the amount fixed by the trial court, and the judgment is affirmed.

AFFIRMED.

382 - 22816

MRS. A. MARCOLIS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 286

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On March 4, 1913, while on Clark street between Diversey boulevard and Dewey place, plaintiff's automobile was struck by a northbound street car belonging to the defendant, and damaged; she brought this suit, and upon trial by the court was awarded damages in the sum of $340.15 for which judgment was entered, from which defendant appeals.

From the evidence the court properly could find that at the time in question a Miss Tuppler was driving plaintiff's automobile south on Clark street; that as she came to Dewey place, which runs east and west, she started to turn easterly, intending to go north on the east side of Clark street to stop at a store. When she got to Dewey place, and before starting to turn, she stopped the automobile and looked southward down the street, and saw a car standing in front of the car barns, about a half block south of Dewey place, and passengers getting on and off; she then started to make the turn, turning towards the left and easterly. Her car was partially upon the northbound track, when she reversed her automobile and started to back towards the west. Just then the northbound street car which she had seen some distance south of her, struck the front part of the automobile. There is sufficient evidence that when she started to make the turn the street car was about

a half block south and standing still.

We are of the opinion that the court could find that plaintiff was in the exercise of due care, and that defendant was negligent. While there is considerable contention that the accident did not happen at a street intersection, yet in view of the positive statements that it was at a street intersection, we cannot say that the court should have concluded otherwise. The court could conclude that as the automobile was first at the street intersection, the motorman of the street car should have given the driver time to pass, and that she was justified in proceeding to make the turn without paying further attention to the street car.

The only questions involved were those of fact. Under all the circumstances we cannot say that the judgment of the trial court is manifestly against the weight of the evidence; it will therefore be affirmed.

AFFIRMED.

391 - 22825

BESSIE FELDMAN,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 288

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that she was injured while alighting from one of defendant's street cars through the sudden starting of the car; upon trial she had a verdict and judgment for $2,000 from which defendant appeals.

Her story is that she was going south on an Ashland avenue street car; that it stopped at Taylor street, a cross street; and she started to alight to transfer to a Taylor street car; that as she was standing with one foot on the step and the other about reaching the ground, the car suddenly started; she was thrown to the ground, receiving injuries. Her story as to the occurrence is corroborated by her son and also by another witness.

Counsel for defendant, in an elaborate argument, have ably attempted to shake the credibility of plaintiff's story. A great mass of detail is presented, which it is unnecessary to narrate. We are of the opinion that while there may be inconsistencies in her story of more or less importance; the jury could properly conclude that in its essentials it was sufficient to support the charges of negligence in the declaration. The plaintiff was evidently not familiar with the English language, but the apparent inconsistencies in her narrative do not change the general outline of her story. No witness gave testimony tending to contradict the statement of the occurrence as given

by the plaintiff and her corroborating witnesses, and there is nothing physically impossible in her story.

It was not reversible error in the trial court to refuse to submit to the jury at defendant's request instruction No. 7; it was not of very great importance and might properly have been given, but its refusal is not sufficient ground for reversal.

Complaint is made at length of what is called the action of the court "in unduly limiting the argument to the jury of defendant's attorney and in making improper remarks in the presence and hearing of the jury, to the prejudice of the defendant." We are inclined to think that counsel for the defendant in his argument was unduly zealous and persistent in his attempts to get before the jury material matter which was not strictly part of the evidence. The court properly ruled this out. Counsel of course could not testify before the jury while making an argument; he persisted in this course until rebuked by the court, and we are inclined to think properly so. What was said by the court in this connection was invoked by the improper conduct of counsel, and defendant cannot now be heard to complain.

We are not inclined to agree with the contention that the verdict is excessive. The plaintiff fell on her side, receiving injuries to her left side and leg; at this time she was about nine weeks' pregnant; she was taken home and stayed in bed about ten days, when she suffered a miscarriage. Doctors attended her and gave her treatment. She was in bed some three weeks after the miscarriage, and for some time the doctor attended her every day. She suffered considerable pain, and there was evidence that while before the accident her health had been apparently good, she was sick during all of the next

by the plaintiff and her corroborating witnesses, and there is nothing physically impossible in her story.

It was not reversible error in the first case to refuse to submit to the jury at defendant's request instruction No. 7; it was not of early first importance and might properly relate to remark to the jury at defendant's request instruction No. 7; it was not of early first importance and might properly have been given, but its refusal is not sufficient ground for reversal.

Complaint is made of remark of counsel in order the action of the court "in unduly limiting the testimony to the jury of defendant's witness and in making improper remarks in the presence and hearing of the jury, to the prejudice of the defendant." It was not incident to error that counsel for the defendant in his argument was unduly sensitive and persistent in his attempts to put before the jury matters which were not strictly part of the evidence. The court promptly ruled this out. However of course could not readily relate this out. However of course could not readily relate matters which were not strictly part of the evidence. The court promptly ruled

summer and has suffered with pains in her side since that time. We are not able to conclude that the judgment is for such a large amount as to necessitate any change.

Many of the criticisms upon plaintiff's brief are fully justified. Counsel should never go outside of the record, and the brief for the plaintiff offends repeatedly in this respect. With this admonition we hope that the offending attorney will hereafter be more careful.

Upon the whole record we see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

396 - 22830

PENNSYLVANIA COMPANY, a corporation, and CHICAGO & ALTON RAILROAD COMPANY, a corporation,
Appellees,

vs.

MRIE RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 289

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On August 27, 1911, a steamer owned by defendant, while navigating in the Chicago river, struck a caisson sunk by plaintiffs in connection with the construction of their new bridge at Stewart avenue, in Chicago. They sued for damages, and upon trial had a verdict and judgment for $11,500 from which defendant appeals.

After weighing the variant evidence and giving due consideration to the opposing theories and to the facts of the occurrence, the jury could properly believe that at this point the plaintiffs had maintained and operated for many years a bridge for the use of their trains; that it was mounted upon a pier near the middle of the stream and revolved in a horizontal plane, so that when open there was room for the passage of steamers on either side. In 1909 plaintiffs commenced the construction of a new bridge, under plans approved by the Secretary of War dated December 15, 1908. A caisson was placed in the river between the south bank and the center pier of the old bridge, in connection with the construction of foundation piers of the new bridge. As a result of this the south draw was closed to navigation, and for several years vessels navigating either way in the river went through the north draw. The caisson was about 28 feet long by 16 feet wide, and on the date of the accident it projected above the water a distance of four feet.

[illegible]

[illegible]

[illegible]

On the day of the accident the steamer Underwood, which belonged to the defendant, started from the Wabash dock, south of 16th street, in tow of the tug Dickinson, belonging to the Dunham Towing & Wrecking Company, to be towed to the dock at 27th and Robey streets. While the Underwood was passing through the bridge at 18th street the tug signaled for plaintiffs' bridge to open. The current in the Chicago river flows from the lake, on account of the pumping by the Sanitary District. As it was traveling through the 18th street bridge the Underwood would be going with the current, and was traveling at about the same speed. Between the 18th street bridge and the bridge at Stewart avenue there is a slight turn in the river, and the tug captain signaled to the Underwood to back up, so that it could be swung through the right-hand or north draw at the Stewart avenue bridge. The back-up signal was two blasts of the whistle, and the Underwood answered with two blasts. Both the captain of the tug and the captain of the Underwood knew that the south draw was closed by the caisson, and that it was nevessary to go through the right-hand or north draw. Instead of backing up, the Underwood began to come ahead with increased speed; the tug captain repeated his signal to back up, which the steamer answered, but this time came ahead still faster. As the signals had not been obeyed, the tug captain ordered the tow line thrown off and backed his tug alongside the Underwood. At this time he could see that her propeller was working ahead; he shouted to the captain that the engine was working full speed ahead. The captain of the Underwood corroborates the testimony of the tug captain, and says that he gave the proper signals, but instead of responding to them in the engine room by backing up, the propellers sent the steamer forward at full speed, and gaining speed all the

time. When the tug captain called to the captain of the steamer that he was working full speed ahead, the latter replied "I can't do anything; I have given full speed astern." The steamer captain testified that when he found the engines were not being run in compliance with his signals he gave the engineer another signal - "You are working the engine wrong." The Underwood continued at increasing speed into the south draw and collided with the caisson, inflicting the damage involved in this suit.

We are of the opinion that the jury properly could discard the theory that the accident happened by the Underwood hitting the steamer Gilchrist, lying south of the 18th street bridge. The slight glancing blow which it gave the Gilchrist was not sufficient in force to throw the Underwood ahead nearly 600 feet onto the caisson. The accident evidently happened through a failure of co-operation between the captain of the Underwood and those in charge of the engine room, and it is not necessary to determine whether it was the captain or the engineer who was at fault. It is admitted that in order to go through the proper draw the Underwood should have retarded its speed just as it came through the 18th street draw. Instead of this necessary operation just the reverse happened and it went ahead at full speed, caused by the negligence of its officers. We see no reason for disagreeing with the conclusion of the jury in finding that the defendant was guilty of the negligence charged in the declaration.

There is no merit in the suggestion that the Underwood went into the south draw because of the manner in which the Stewart avenue bridge was swung. Under proper management the Underwood could have gone into the right-hand draw; and that this was the only side through which the steamer could pass was

known to all of the parties concerned.

We agree with defendant's contention that the construction of the new bridge and the caisson was unlawful without the authority of the City of Chicago. This is too well established to require extended discussion. In Cummings v. Chicago, 188 U. S. 410, the court, after full discussion and comment on many cases, concludes, with reference to the act of Congress giving permission to erect such structures, as follows:

> "The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies."

In Cobb v. Commissioners, 202 Ill. 427, the court said of the permission by the Secretary of War:

> "It is a declaration by the guardian of the interests of the public at large that the proposed structure will not interfere with navigation. It is strictly permissive, and not an authorization by paramount authority to build the structure."

Many other similar cases might be cited.

The permit from the Secretary of War to build the bridge was dated 1908, and the caisson in question was constructed under that permit. Subsequently negotiations were had looking to an increase of the width of the stream at this point, and at the request of plaintiffs this permit had been withdrawn some time before the accident, although a new permit had been issued on August 21, 1911, a few days prior to the accident. There is considerable discussion as to the effect of the new permit on the obstruction in the stream caused by the caisson constructed under the old permit, but we do not understand that it is seriously disputed that the foundations

known to all[illegible] parties concerned.

of the new bridge occupy the same space at the identical point occupied by this caisson. However this may be, in view of the conclusion we have reached we do not think this is a matter of importance.

Is the lack of a permit for the bridge and caisson from the city of Chicago a defense to this suit? That depends upon whether this lack was causatively connected with the accident. That this test is a proper one has been decided in many cases; the most recent of which we know is by this court. Edwards v. Pratt-O-Lite Co., No. 22308, opinion filed December 18, 1916.

In Starr Brewery v. Hauck, 222 Ill. 348, a boy was killed on the street; it was claimed that he was violating a city ordinance at the time, and the court said: "Even if the deceased had been engaged in the violation of an ordinance to bar a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury." Among other cases announcing this rule are Pennsylvania Co. v. Frana, 112 Ill. 398; Lawrence v. Village, 157 Ill. App. 560; Crossen v. Chicago & Joliet Electric Ry. Co., 158 Ill. App. 42; Engel v. Paramlee Co., 169 Ill. App. 410; Sutton v. Wauwatosa, 29 Wis. 21; Minerley v. Union Ferry Co., 9 N. Y. Supp. 104.

In Dimes v. Petley, 15 Q. B. 274 (117 English Reports 462), the court, in considering facts somewhat analogous to those in the case at bar, said that a plea was bad -

> "for not alleging that there was a necessity for the defendant to navigate the ship over that part of the river where the nuisance was, nor even that this part of the river was his right course and that it would have been inconvenient and difficult to have taken any other course by which the nuisance might have been avoided. * * * We clearly think that he (the navigator) cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience."

This rule is so well established as to require no further citations.

We are of the opinion that the lack of a permit for the construction of this caisson was not the proximate and efficient cause of the accident. This caisson was stationery, and had been a conspicuous object in the channel for two years; the officers on the Underwood had known of its presence and of the necessity of using the north draw during this time. The accident happened in broad daylight and, as we have above stated, the caisson stuck at least four feet above the water, and was a large object readily seen. All the witnesses concerned in the occurrence agree as to knowledge on their part of the necessity of going through the north draw. Under the circumstances the same accident would have happened whether a permit from the city authorities had been issued or not; in other words, the existence or non-existence of a permit had no causal connection whatever with the occurrence.

In this view of the matter, the ruling of the trial court excluding certain ordinances of the city was not error. We have reached our conclusion upon the assumption that no such structure as was contemplated at this point could be erected without authority from the city.

We hold that the sole cause of the accident was the negligent management of the steamer, unaffected either by the conduct of the captain of the tug or those in charge of the Stewart avenue bridge.

We are of the opinion that the damages were not excessive. The plaintiffs were entitled to recover the cost of the repairs to the caisson. The physical injury was not in dispute, and plaintiffs introduced evidence tending to show that the cost of repairing was something over $14,000. The

verdict of the jury was considerably less than this, and the defendant has no just cause for complaint.

We find no error in the giving or refusing of instructions, or upon the admissibility of evidence.

Upon the record and under the law the plaintiffs were entitled to recover, and the judgment is affirmed.

AFFIRMED.

399 - 22833

ADVANCE TERRA COTTA COMPANY,
a corporation,
Appellant,

vs.

R. WATSON CROSS,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 291

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant filed its bill of interpleader alleging that Henry B. Prosser and R. Watson Cross, the appellee herein, were rival claimants for certain shares of stock of the complainant company. After reference to a master in chancery and hearing before the court, it was held that the stock belonged to Cross, and the bill was dismissed for want of equity and judgment was entered for costs amounting to $278.75 against the complainant in favor of the defendant R. Watson Cross. The propriety of this decree is questioned by this appeal.

As a general rule the costs of all successful parties should eventually be taxed against the person who made the false claim and thus made a bill of interpleader necessary. Dickinson v. Grigsville National Bank, 111 Ill. App. 183; affirmed in 209 Ill. 350. However, quoting from Cyc., vol. 23, page 34, "Where it appears that the complainant acted collusively or in bad faith, the costs of the successful claimant may be taxed against him in both the trial and appellate courts." Michigan Plaster Co. v. White, 44 Mich. 25; St. Louis L. Ins. Co. v. Alliance L. Ins. Co., 23 Minn. 7.

We are of the opinion that the chancellor properly held that this case came within this second rule and that the bill was not brought in good faith.

It appears that the complainant company, by Henry B. Prosser, who was its president and agent, made an agreement with Cross that if Cross would perform certain services for the complainant company he would be given as consideration certain shares of stock; that such services were rendered by Cross, and that 50 shares of stock, which is the property in controversy, were issued by the company to Cross, free and clear of all claims, as part payment for his services. It is impossible to conceive that Prosser, the president, had any rightful claim to this stock. Whatever controversy there was lay wholly between the complainant company and Cross. There was no occasion for a bill of interpleader.

While it is true that in the first decree it is recited that the bill of interpleader was properly filed, yet in this same decree the consideration of all questions of costs between all the parties, and all other questions and directions, were reserved for further action by the court upon the coming in of the master's report. Notices of the hearing before the master were given to the complainant, who filed objections thereto, and subsequently complainant appeared before the chancellor, when the cause was reached for trial on the regular chancery trial calendar, and participated by motions and otherwise.

We hold that the bill was rightly dismissed for want of equity, and there was no abuse of judicial discretion in ordering that the costs should be taxed against the complainant.

AFFIRMED.

403 - 22837

ANNA E. BASTLE, Admx. Estate
John A. Bastle, Deceased,
Defendant in Error,

vs.

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

205 I.A. 293

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for the death of John A. Bastle, caused, as alleged, by the defendant. Upon trial she had judgment for $8,000 which the defendant seeks to have reversed.

The suit is an action at common law. The declaration alleges that the defendant is a common carrier; that it had a certain team track on which it placed cars whose contents would be delivered to consignees; that it was the custom and duty of defendant to notify such consignees, or their agents or servants, before it moved such cars; that deceased was the servant of a certain consignee of a car of eggs, which defendant had placed upon the team track; that the deceased, in discharge of his duties to the consignee, was around and about the car for the purpose of inspecting the eggs; that because of the sudden movement of the car without warning, deceased was injured and died. Defendant filed a plea of general issue and special pleas setting up a defense under the Compensation Act.

Defendant urges in this court that it appears that the occupation of the defendant and of the deceased's employer come within those occupations specified in section 3 of the Workmen's Compensation Act; that therefore defend-

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ant's motion in arrest of judgment should have been sustained, as the declaration fails to state a cause of action under the Compensation Act. We do not agree with this contention; the declaration makes no reference to the Compensation Act, and plaintiff is not seeking to recover except in the common law action of tort.

Defendant asserts the operation of section 29 of the Workmen's Compensation Act of 1913, which provides that "where an injury or death for which compensation is payable by the employer under this act is not proximately caused by the negligence of the employer," but is caused by a third person, creating liability therefor if the third person is bound by the Compensation Act, "the right of the employe or personal representative to recover against such other person shall be subrogated to his employer." We are of the opinion that under the evidence the employer of the deceased was not under the Compensation Act; hence this section is not applicable. Deceased's employer was Marsh L. Brown & Company, a corporation, doing a brokerage business in butter and eggs; it had office rooms on the second floor of a building on South Water street, employing four or five men; it handled eggs in carloads, and all eggs received by it were subject to inspection. When a carload of eggs was placed by a railroad upon a teamtrack, this company's employes would examine the eggs and report their condition. The eggs were usually sold to out of town customers, and after inspection they were either rebilled to out of town customers or switched to a cold storage warehouse, or unloaded and hauled from the teamtrack to such warehouse, where they were stored for purchasers. Neither the Brown Company nor deceased had anything to do with the unloading or hauling of any eggs at any time; this was done

by others. No action had ever been taken by the Brown Company towards accepting or rejecting the Compensation Act.

The kinds of employers which under the terms of the Act shall be conclusively presumed to have elected to be under it are enumerated in section 3. We are of the opinion that Brown & Company did not come within any of these. The only occupation which it can possibly be claimed affected Brown & Company is described as "carriage by land and water and loading or unloading in connection therewith." We do not see how this could possibly apply to Brown & Company; they certainly were not engaged as carriers, and the provision in question is not in the alternative but is described as "carriage * * and loading or unloading in connection therewith." Even if we should separate these occupations, it cannot be said that Brown & Company was engaged in the business of "loading or unloading in connection" with carriage by land or water. Whatever loading or unloading was done in their business was performed by a teaming or transfer company and not by deceased's employers. Its main business was that of commission brokerage, and we do not see how it can reasonably be said that any teaming which it hired to be done for it could be its "occupation, enterprise or business" within the meaning of these words as used in the statute.

This is the only point which we are called upon to decide. The motion in arrest was properly denied. The Compensation Act is not involved. For the reasons above indicated the judgment is affirmed.

AFFIRMED.

406 - 22840

WILLIAM J. JENSON, MAX L. WOLFF and ALBERT H. MANNING, copartners, trading as Regelin, Jenson & Co.,
Appellants,

vs.

OLIVIA NELSON,
Appellee.

APPEAL FROM COUNTY COURT, COOK COUNTY.

205 I.A. 295

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover for a balance claimed to be due from defendant, including the sum of $200 for commissions as brokers for negotiating a sale of real estate. Defendant denied this obligation for brokers' commissions, and filed a plea of set-off. Upon trial by a jury judgment on defendant's set-off was entered in her favor for $132.89 from which plaintiffs appeal.

There is no dispute as to the amounts due to the defendant; they are included in plaintiffs' statement of claim as credits to which she is entitled. The controversy centers around the alleged liability for commissions.

We are of the opinion that under the evidence the jury could properly find that at one time defendant had given plaintiffs the exclusive agency for the premises owned by her, for a period of three months from February 1, 1915, at the price of $10,000 "or at such a less price as we may conclude to accept"; that plaintiffs succeeded in procuring a customer with an offer of $8,200 which was submitted to the defendant, but that plaintiffs were clearly informed that this would not be accepted. It is true that a contract for this amount was drawn up and given to the husband of defendant, who said that he would look it over after he got home. There was evidence that the defendant did not understand

until the contract was examined at her home that it was for the price of $8,200. Subsequently, upon inquiry as to why defendant did not sign the contract of sale, plaintiffs were informed that she would not sign a contract for this price, that it should have been $8,250, and that no contract would be signed until the defendant had closed up another deal upon another piece of property. Under the circumstances we see no reason to disagree with the conclusion that plaintiffs did not procure a customer which the defendant was obliged to accept, and that under the terms of the written contract she was not obliged to accept any customer except at the first figure of $10,000.

It was not prejudicial error to admit testimony by the defendant as to this other deal; it was not parol evidence tending to change the written contract; it simply appeared as a reason given by the defendant why she was not willing to accept the offer of $8,200 produced by the plaintiffs. The written contract is explicit that the defendant might or might not reject any offer of less than $10,000, and it was not error to permit it to appear why a less sum was rejected.

There was some informality in connection with the bringing in of the verdict. The first verdict returned was evidently not in accord with the evidence and the jury's conclusion; there seems to have been some confusion on account of the forms of verdict submitted to the jury. Afterwards, under circumstances which it is unnecessary to narrate, the jury brought in the proper form of verdict. There was an attempt made by affidavits to show that the second form of verdict was induced by improper conduct on the part of the

attorneys for the defendant, but no impropriety has been shown.

The verdict is in accord with the weight of the evidence, and no reversible error occurred upon the trial. The judgment is affirmed.

AFFIRMED.

responsible for [illegible], but no investigation has been
known.

The verdict is to accord with the weight of the
evidence, and no reasonable doubt remains upon the mind.

The judgment is affirmed.

AFFIRMED.

410 - 22844

JOHN SCHULTZ, for use of
R. J. Whitlock,
Appellee,

vs.

THE HOME INSURANCE COMPANY
OF NEW YORK, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

205 I.A. 297

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a suit on a fire insurance policy issued by the defendant, upon trial by the court had judgment for $798.50, which the defendant seeks to have reversed.

Schultz, the nominal plaintiff, made a contract with Stanley Anuszanskas, a contractor, for the construction of a building on a lot owned by Schultz, for the sum of $3,200. To protect himself against loss by fire during construction, this contractor insured the building in his own name for one year with the Glens Falls Insurance Company. Schultz also took out fire insurance on the building with the defendant company; this policy was in Schultz' name and covered virtually the same period as was covered by the contractor's policy. When nearly completed, and prior to delivery to Schultz, the building was damaged by fire. The appraiser for the Glens Falls Insurance Company examined the building and appraised the damage at $798.50. The contractor, agreeing to this, was paid this amount by the Glens Falls Company. At the same time Schultz assigned to R. J. Whitlock, who was the agent of the Glens Falls Company, any claim he might have against the defendant company for loss by this fire. Thereupon the contractor proceeded to complete the building, and repaired the damage occasioned by

the fire, using therefor nearly all the money received from the Glens Falls Company. Afterwards, when the building was completed, it was turned over to Schultz and accepted by him, and the full amount of the contract price, $3,200, was paid to the contractor. There is abundant evidence that at this time Schultz, both verbally and by affidavit, expressed himself as satisfied with the building and with the repair of the portions damaged by fire, that he had suffered no loss through the fire and made no claim against the defendant on account of his policy for any loss.

By the terms of its policy the defendant contracted to compensate Schultz for any "loss or damage by fire." Is he entitled to compensation when he has suffered no loss or damage? We are of the opinion that he is not. The contract of insurance against loss by fire is a contract of indemnity; it is to make good for loss, to compensate for damages. This rule has been stated with great frequency in the text books and in the opinions. In 13 Am. & Eng. Ency. of Law, 2nd Ed., page 100, it is said:

> "Unlike the contract of life insurance, but like that of marine, the contract of fire insurance is a contract of indemnity; and this well established fact is the source of several important doctrines in the law of fire insurance."

Our Supreme Court, in People v. Rose, 174 Ill. 310, quoted with approval the following:

> "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes surety to the other that he shall not suffer loss, prejudice or damage by the happening of the perils specified, to certain things which may be exposed to them." Lucine v. Crawford, 2 Bos. & Pul. 300.

> "Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril." 11 Am. & Eng. Ency. Law, 280.

said:

"Unless the contract of life insurance, may it be wholly or partly forfeited by the insured through a contract of indemnity; it is to-some good for loss, to forfeit property by fire. This rule has been stated with considerable fair emphasis. The contract of insurance against loss by fire is a contract of indemnity; it is to-some good for loss, to be paid to them or insured. As one of the objects that be fixed to insure against loss by fire is not. The contract of insurance against loss by fire is material to endeavoring upon be paid- fire." In accordance to endeavoring upon be paid- the payment to payment of fifty dollar his may face.

If the terms of the policy the policyholder cancelled on time during the life and must be given the amount of the premium paid, the policyholder cancelled an existing plan the policy was that of his time benefit, this warranty not by estimate, may pay to the contractor. Time to warranty already by DJM, and the first amount of the contract paying. [illegible] was contracted, it was intend also to notify and contract the plan Julia Graham. Although, upon the policy the time, using insurance penalty all the money insurance plan

"Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness, - qualities upon which subsequent writers have scarcely been able to improve. * * * * It had its origin in the necessities of commerce. It has kept pace with its progress, expended to meet its rising wants and to cover its ever widening fields, and, under the guidance of the spirit of modern enterprise tempered by a prudent forecast, it has, from time to time, with wonderful facility adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required it holds out its fostering hand and promises indemnity." May on Insurance, secs. 1-2.

"A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phillips on Insurance, sec. 1.

"The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guarantee the other against loss by certain specified risks." Webster's Dictionary, "Insurance."

In accord with these statements are Barnes v. People, 168 Ill. 425; Niagara Falls Ins. Co. v. Keenan, 181 Ill. 575, and many other cases.

To allow this judgment to stand is to give plaintiff a clear profit to that amount; for $3,200 he would get not only an equivalent of this amount in the value of the building, but also $798.50. If this should be deducted from the contract price of $3,200, the plaintiff would get a $3,200 house for $2,401.50. The insurance policy was not intended as a policy of profit to the insured; this is contrary to its genius and purpose.

Any suggestion made in argument that the amount paid the contractor by the Glens Falls Company was not sufficient to make good the damage is not convincing in view of the record.

Plaintiff, having suffered no loss or damage, is

not entitled to recover on the policy issued by the defendant; hence the judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

415 - 23849

ALBERT FRITZ,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 298

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a suit to recover damages for injuries sustained in a collision between an automobile in which he was riding and one of defendant's street cars, had a verdict and judgment for $300. He has appealed, alleging the inadequacy of this amount.

We are of the opinion that the pleadings before us do not justify a review of the record. The abstract fails to show that the bill of exceptions contains any motion for a new trial; although we are not required to do so, we have inspected what purports to be the bill of exceptions, and no motion for a new trial appears to have been made. Some twelve exhibits were introduced by the defendant; the abstract gives no information whatever as to their character; they are simply described as "defendant's exhibit 1," and so on through the entire number. The abstract gives what is designated as "an abstract of testimony," but how this testimony appears in the record, whether by bill of exceptions or not, is not stated. The abstract gives only one instruction of ten given at the request of plaintiff, and the only reference to defendant's instructions are the words, "twenty-three instructions given on behalf of the defendant pertaining to the question of liability." The abstract fails to show any certificate by the trial

judge that the purported bill of exceptions was certified to by the judge; it apparently was certified by the clerk of the court, who is without authority to do this; this can be done only by the trial judge.

"It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon." Gibler v. City of Mattoon, 167 Ill. 18. "Appellant is in no position to raise this question. Copies of these exhibits were not made a part of appellant's abstract. Our rules require that an abstract 'must be sufficient to fully present every error and exception relied upon.'" Rehfuss v. Hill, 243 Ill. 140. "The court does not search the record to ascertain the issues but acts entirely upon the abstract." Village v. Winkleman, 270 Ill. 149. "The abstract of the record is the pleading of the party seeking to have such record reviewed upon appeal or by writ of error." People v. Paul, 167 Ill. App. 557; see, also, City v. McGovern, No. 22420, opinion of this court, filed November 27, 1916.

We also find that plaintiff has assigned as error, in several assignments of error, the refusal of the trial court to instruct the jury to find the defendant not guilty. We assume these assignments of error were inadvertently included in plaintiff's assignments. It has been held that assignments of error are in the nature of a declaration; and plaintiff is asserting in this court that the trial court should have instructed the jury to ~~xxx~~ bring in a verdict of not guilty.

Although unnecessary, in view of the apparent serious injuries of the plaintiff, we have considered the

merits of the occurrence. The clear preponderance of the evidence shows that the accident was caused by the reckless driving of the automobile containing the party of which plaintiff was one, at midnight, at a high rate of speed, from a cross street directly in the path of the approaching street car. The evidence demonstrates that the negligent driving of the automobile by its driver caused the accident. Plaintiff sat at the side of the driver, was nearest to the street car, with an unobstructed view; although it was in plain sight as he approached, he gave no warning and did nothing to prevent the driver of the automobile from going in front of the street car. Plaintiff testified upon the trial that he remembered nothing of what happened just before the accident.

Where the preponderance of the evidence is in favor of the defendant, we shall not set aside a verdict for the plaintiff simply upon the ground of the inadequacy of the amount awarded. In so holding we are in accord with O'Malley v. C. C. Ry. Co., 30 Ill. App. 309; 33 Ill. App. 354; Hackett v. Pratt, 52 Ill. App. 346; Scott v. O'Hair, 188 Ill. App. 26; Olek v. Fern Rock Woolen Mills, 180 Fed. 117.

The defendant herein does not ask that the case be reversed, preferring rather to submit to the judgment than bear the burden and expense of another trial.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

419 - 22853

T. K. CLEVELAND, as Inter-State Produce Company,
Appellee,

vs.

M. H. EICHENGREEN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 300

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a controversy growing out of the attachment suit upon which we have passed in No. 22215, Lepman & Heggie v. The Inter-State Produce Co., opinion this day filed. In that attachment suit M. H. Eichengreen, the defendant in the present case, was summoned as garnishee. A statement was made by him showing the amount in his hands due the Inter-State Produce Company, which was turned over except the sum of $897.88 which the garnishee retained to cover the claim of Lepman & Heggie in the attachment suit. Upon the quashing of the attachment an order was entered discharging the garnishee. A certified copy of such order was served upon him and a demand made upon him for the balance of the money, which he refused to turn over, whereupon this suit was commenced against him, and plaintiff had judgment for $911.60, which is the original amount owing to the plaintiff with interest. Defendant appeals to this court.

After the defendant refused to turn over this money, the plaintiff in No. 22215 sued out a writ of error in that case and filed the same with the clerk of the Municipal Court and presented a stay bond, and an order approving

other circumstances a safe bond, and no court attempted in that bond was filed the same with the clerk of the municipal court, the plaintiff in Ex. 10213 bond was a suit of seven

also the defendant refused to give such bond

court.

on the plaintiff his interest. Informed witness to this

the Interest Co. 10213, which is the original journal entry mentioned this suit was concerned entered the, and plaintiff

for the interest of the county, which be retained as judgment, of most value and turned them the was a deemed made them the

the was related Disobeying the jurisdiction. I plaintiff said

testimony to enter the claim of Indiana & Ohio in the bankruptcy suit. Then the journal of the plaintiffs on at-

Dorsey was sworn for him of 1917, by whom the plaintiffs file books and the Inter-State Indiana Company, which was

mine. A statement was made by the retiring the moneys to the defendant in the present case, one summons be plaintiff file the. In this attachment suit E. Jamestown,

Judge & Smith v. The Inter-State Electric Co., witness

testimony will then again be here passed in be. Smith.

This is a continuation pleading out of the at-

IN. PROCESSING DOCUMENTS

Exhibits for claims by the bank.

E. E. Smith-Co., as Commissioner Indiana Indiana Company.

Appellee.

Pa.

B. E. Commissioner.

Appellant.

Attorney Name Continued Court

At Counsel.

10213 Ind. 500

the same and staying the proceedings in the Municipal Court was then entered. Several weeks thereafter, on application to this court, in No. 22215, the writ of error was made a supersedeas. The affidavit filed by Richengreen in this case does not show that he was ever made a party to the writ of error or that he ever received formal notice of the supersedeas, or that the supersedeas was filed with the clerk of the Municipal Court.

It is contended by the defendant that as this suit against Richengreen was begun after the writ of error was sued out in the other case, and that such writ was made a supersedeas, the writ may be pleaded in abatement. In certain early decisions of our Supreme Court will be found statements seeming to support this as a general proposition. We hold, however, that they are not applicable to the present situation for the following reasons: (1) We think it is not without importance that at the time demand was made upon the garnishee for the money belonging to the plaintiff the garnishee had been discharged, of which he had formal notice. There was no ground, legally or otherwise, at this time why he should refuse to turn over the money to the party entitled to it. We know of no rule which would permit a garnishee to retain funds in his hands, in the expectation that the defeated party in the original case may sue out a writ of error. Bigelow v. Andress, 31 Ill. 322; Shinn on Attachment, ed. 1896, secs. 395 and 355. (2) Even if this were not true, the present action against the defendant was commenced before the writ of error was made a supersedeas; this suit was commenced January 26, 1916, and the writ of error in the attachment suit was not made a supersedeas until March 13, 1916. We know of no rule which would permit him to

retain the fund during the pendency of a writ of error where no supersedeas has been allowed; such a rule would seem unreasonable as permitting a garnishee to retain funds not belonging to him, without any security to the rightful owner pending the disposition of litigation to which he is not a party.

We are disposed to be in accord with the rule as stated by Judge Marshall in Runyon v. Bennett, 4 Dana 598, where he says:

> "A supersedeas suspends the efficacy of a judgment, but does not, like reversal, annul the judgment itself. * * The judgment of one tribunal cannot be deprived of its force, or in any manner affected, by the order of another, until there be some evidence of the order among the records of the tribunal in which the judgment itself remains, or some notice of it given to the officers concerned in executing the judgment, or at least to the parties to be benefitted by it."

The rule is applicable to the present situation. The defendant, Eichengreen, is not a party to the proceedings in this court in the writ of error case, and the supersedeas writ was never filed with the clerk of the Municipal Court, or any notice of its issuance served upon Eichengreen.

As the matter now stands between the two cases, the present controversy in this case is somewhat of a moot question, for by the opinion delivered in the other case the order discharging the garnishee has been affirmed, so that in any event there remains no reason why the defendant herein should not pay over the money to the plaintiff.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

423 - 22856

JOHN A. DONAHUE, trading as John A. Donahue & Co.,
Appellant,

vs.

WHEELING MOLD and FOUNDRY CO., a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 301

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a contract with defendant. At the close of plaintiff's case, upon motion the court found the issues against the plaintiff and entered judgment for the defendant and against the plaintiff for costs. From this judgment plaintiff appeals.

This is an action of the fourth class in the Municipal Court. By his statement of claim plaintiff alleges a contract for the sale by him to the defendant of a certain "road roller business" for the sum of $7,000, under certain conditions. Plaintiff asserted that he had performed his part of the contract and that defendant had breached its undertaking. During the progress of the trial it appeared that plaintiff had not performed his undertakings under the contract in certain particulars, and plaintiff undertook by evidence to explain this nonperformance. The trial court was apparently of the opinion that because the plaintiff had not proven performance in every detail, that regardless of whether such nonperformance was explainable or excusable, there was a variance between the allegations of the statement of claim and the proof; hence he found against plaintiff's claim.

We have not been favored with a brief from the

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appellee; hence, under the rules of our court, we shall accept as true the statement of the case as it appears in the brief of the appellant.

It has been frequently held that in an action of the fourth class in the Municipal Court the form of action is such as the evidence makes it. Fisher v. Tauber, 174 Ill. App. 436; Paris Flouring Co. v. Imperial Cotto Milling Co., 181 Ill. App. 215; see, also, Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311, and Doherty v. Schipper & Block, Inc., 157 Ill. App. 413.

If nonperformance of some of the details of his contractual undertakings was excusable or agreed upon between the parties, plaintiff would still be entitled to recover whatever his damages may be. We hold that it was error for the trial court to rule against plaintiff on the ground of variance. Hence the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

the course commonly for a new trial.

Motion for a new trial.

The record of sentence. Since the judgment is reversed and the cause remanded for a new trial, the record of sentence will be entirely set aside; hence, unless the rules of the court, as usually enforced, require the clerk to enter a minute of the action of the appellate court, it may be entirely omitted.

It has been frequently held that in an action of the first class in the Municipal Court the jury, after rendering its verdict, may be discharged by the trial judge. Elgutter v. Tucker, 196 Ill. 484. See; Rules Governing Pr. A. Municipal Courts Ill. 1907, rule 34.

It sometimes happens that some of the members of the petit jury, after rendering their verdict, refuse to assent thereto. Where the jury, after rendering their verdict, refuse to assent thereto. Where the jury, after rendering their verdict, refuse to assent thereto, the court may discharge the jury and order a new trial. Wabash R. R. Co. v. Brow, 64 Ill. 324; and Chicago & E. I. R. R. Co. v. Ill. Cent. R. R. Co., 74 Ill. 172. Vbh. 436; Rules Governing Pr. A. Municipal Courts Ill. 1907, rule 34.

426 - 22860

NELLIE CARLIN, as Administratrix of the Estate of Philip Gurivitz, deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 303

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Philip Gurivitz, of the age of six years, was struck by one of defendant's street cars and killed. His administratrix brought this suit, and upon trial before a jury had a verdict and judgment for $2,500.

As we have arrived at the conclusion that there must be another trial, it is unnecessary to narrate the evidence as to the facts. The general outline of the story is that as the street car was running northeasterly on Blue Island avenue, in Chicago, the deceased and two other boys were chasing a dog, and started to cross the street in front of the car; the two boys in the lead crossed in safety, but the deceased, who was somewhat in the rear, was struck by the car.

The question as to the exercise of reasonable care, under the circumstances, by the motorman of the car was the point in controversy. Matters of fact were sharply in dispute; it was an exceedingly close case on the facts, and therefore made it necessary that the rulings on evidence and the instructions of the court should be virtually free from error.

One of the witnesses testifying on behalf of plaintiff was asked whether he had heard the motorman say

anything right after the accident, and, upon the witness answering yes, was asked what the motorman had to say. This was objected to by defendant's counsel as not part of the res gestae and not binding upon the defendant. The objection was overruled and the witness was permitted to reply that the motorman had said "he was too nervous to stop the car so quick." The motion was made to strike out the answer, which motion was overruled. We are of the opinion that this statement of the motorman was not part of the res gestae and that it was incompetent. In Pennsylvania Co. v. McCaffery, 173 Ill. 169, the rule is stated:

> "That which occurs before, or after the act is done, is not a part of the res gestae, although the interval of separation is very brief. The declaration of a person, injured by a railway train, as to the cause of the injury, made after the declarant was removed from the place of injury, is not admissible as a part of the res gestae; it is a statement as to a past occurrence and mere hearsay. (Montag v. People, 141 Ill. 75; Chicago West Division Railway Co. v. Becker, 128 id. 545.)"

In Baier v. Melke, 211 Ill. 512, the court said:

> "A declaration made concurrently with the act and constituting a part of the res gestae is admissible in evidence, but where it is a mere narration in regard to a transaction already passed it does not bind the principal and cannot be proved."

Testimony of a conversation with the driver of a cab just after an accident, in an action against the owner for the negligence of the driver, in which the driver said it was all his fault, is not admissible. Springfield Consol. Ry. Co. v. Puntenney, 200 Ill. 9; see, also, Levy v. Morand Bros., 185 Ill. App. 266; Chicago West Division Ry. Co. v. Becker, 128 Ill.545. The rule is so well established as to need no further citations. The statement said to have been made by the motorman after the accident was merely a comment by him as to a past event, - an expression of opinion by him as to what had already happened. It clearly comes within the rule as stated in the above cases, and its introduction was prejudicial error.

We think it was error to give on behalf of the plaintiff instruction No. 8, for the reason that it is a peremptory instruction to find a verdict for the plaintiff, without any reference whatever to the care of the parents or next of kin of the deceased. The fact that the jury may have been justified in concluding from the evidence that the parents were in the exercise of due care for the deceased does not justify a peremptory instruction for the plaintiff wholly disregarding this element.

It was also error to give instruction No. 9 for the reason that it cnntains a supposition that "the mother was attending to her usual occupation in their home" at the time of the accident. There is no evidence on this point; the mother did not state what she was doing at the time of the accident, and the only evidence as to where she was at the time appears in a statement by a witness indicating that before the accident he had met the mother and the deceased near the house, but whether inside or outside the witness was uncertain. This instruction is also open to the objection that it amounts to an instruction that, as a matter of law, if the father was not present at the time of the accident and the mother was attending to her usual occupation in her home, the parents were not negligent. We do not understand it is the law that where families reside upon a street where there are street car tracks no attention whatever need be given to children playing in the street. We think that the instruction also is in error in its assumption that the father was away at work; there was no proof of this.

It also was error to give on behalf of plaintiff instruction No. 11, which refers to the interest or lack of interest in the result of the case of witnesses

testifying. No witness having any interest in the result of the suit gave testimony, and we think the instruction was clearly directed at the employes of the defendant who did testify, with the suggestion that they had an interest in the result of the suit, whereas as a matter of law they did not. The testimony of the motorman of the car was of course very important, and such an instruction tended to minify its credibility. Such an instruction has been condemned in Roberts, Admr., v. C. C. Ry. Co., 262 Ill. 228; Powers v. C. C. Ry. Co., 185 Ill. App. 158; see, also, Feitl, Admx., v. C. C. Ry. Co., 211 Ill. 279, and C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9. Directing the attention of the jury, as did this instruction, in a questioning way to the testimony of the motorman was prejudicial error.

There is no good reason why the court should have refused to give on behalf of defendant instruction No. 2; it correctly states the law. Margolis v. C. C. Ry. Co., 197 Ill. App. 316; Scanlan v. Chicago U. T. Co., 127 Ill. App. 406.

We are inclined to think that defendant's refused instruction No. 3 was perhaps covered by other instructions; we are not referred to any particular element contained in this instruction which is not found in instructions Nos. 15 and 17.

It was not reversible error for the court to refuse to give defendant's instruction No. 6, with reference to the fenders. It might have been given as a matter of precaution, but under the evidence and pleading was not necessary. The count charging defective equipment had been withdrawn, and we do not think there was any evidence tending to show any defect in the condition of the fenders.

For the errors above indicated the judgment is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

to the dismissal of the motions and prejudicial error.

There is no good reason why the court should have refused to give an appeal of defendant instruction (J. S; it correctly stated the law. Kentucky v. C. C. C. C., 124 111. App. 111. Adp. dism; Central v. Chicago C. C., 124 111. Adp. dism.

We are inclined to think that defendant's refused instruction No. 3 was properly entered to state the statutes law. It was not.

It was not incumbent upon the court to give defendant's instruction No. 6, with reference to the Inquest. It might have been given as a matter of precaution, but under the evidence and circumstances of the case, and the fact that the jury had been instructed properly, with the exception that they had no interest in the result of the suit, whether in a matter of law they did not. The testimony of the witness was of course very important, and upon an instruction should be carefully. Such an instruction has been examined in Kentucky, 111 v. C. C. C., 124 111. App. 111; Illinois v. C. C. C., 124 111. App. 111; see, also, Illinois v. C. C. C., 124 111. App. 111; see; also, Illinois, 111 v. C. C. C., 111 111. App. 111, and C. C. C. C. Instructing the attention of the jury, as was this instruction, is a dangerous practice, and the court refused the instruction properly.

273 - 22707

CHARLES A. NOWAK,
Appellant,

vs.

CLARENCE H. GEIST,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

205 I.A. 305

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court in favor of Clarence H. Geist, defendant. On October 17, 1905, complainant, Charles A. Nowak, filed his bill of complaint, alleging therein that on the first day of May, 1902, he had entered into a copartnership with the defendant, for the purpose of securing, selling, financing and disposing of public utility franchises; that under the terms of the partnership agreement he was to assume one-half of the losses and receive one-half of all profits of the business; that said partnership was to continue for a period of three years; that the parties continued to transact business under the partnership agreement until the 15th day of February, 1905, when complainant, "having much reason to be dissatisfied with the conduct of the defendant, called upon him to correct the same and immediately rectify the accounts of said copartnership"; that the defendant failed to do as requested, and "thereupon each of the said copartners consented to the dissolution of their copartnership."

It is further alleged in the bill that the complainant had contributed one-half of the capital and of the expenses of the copartnership business; that during its continuance gas and electric lighting plants and franchises were acquired, bought and sold; that complainant has repeatedly requested defendant to settle and adjust the partnership affairs and accounts, but

that defendant has wrongfully refused to "so settle, account and adjust the said business"; that the defendant has refused, on demand made by complainant, and that he still wrongfully and fraudulently refuses, to account to complainant.

It is also alleged in the bill that the copartnership had secured an option on all of the stock of the Hammond Illuminating Company, which company supplied Michigan City, in the State of Indiana, with gas; that thereafter the copartnership had sold said option and the defendant received the proceeds of such sale, and that he has never accounted to the complainant therefor, but fraudulently and wrongfully refused so to do.

The bill prays that the defendant be required to answer the bill, that an accounting be ordered of the dealings and transactions of the copartnership, and that the respective rights of the complainant and the defendant therein be ascertained.

An unimportant amendment was made to this bill on February 4, 1910.

In his answer the defendant denied specifically the allegations with relation to the formation of the partnership for the purposes charged in the bill, and alleged that a full and complete settlement was made between the parties on about December 1, 1902; the answer admitted the purchase by complainant and defendant of a one-half interest in the Hammond Company, but denied that they together secured gas franchises from the cities of Whiting, East Chicago and Indiana Harbor, in the State of Indiana, or from any of said cities, as alleged in the bill; the answer also admitted that franchises were taken in these three last named cities in his, defendant's, name, but denied that Nowak had any interest in them; he, defendant, further denied that the option on the Hammond Company stock was ever sold at a profit to him, defendant; that he received a large sum of

money or other property for said option and franchises, and that he was in no way indebted to the complainant.

On a hearing on the bill and answer, the chancellor found in favor of the complainant and referred the matter of the accounting to a master in chancery to hear evidence and report his findings and conclusions thereon to the court. After the master had heard some evidence in the cause he appealed to the court for directions as to whether the reference to him was to include an accounting of the partnership affairs and business as of February 1, 1903, at which time it is conceded by complainant the partnership was dissolved, or whether he should proceed to an accounting of certain transactions had by defendant with and concerning the partnership assets subsequent to that date.

In a report filed in the cause the master found that on February 1, 1903, the defendant owed the complainant the sum of $912.50; that the defendant had in his possession at said time 600 shares of the capital stock of the Union Gas Company, which shares of stock were purchased by defendant for the sum of $14,352, for the payment of which sum the defendant had executed and delivered his personal note; that said note was subsequently paid by defendant, and that the 600 shares of stock received by defendant from the Union Gas Company were not worth more than the said sum which he had paid therefor.

The report of the master, which deals at length with other facts involved in the controversy between the parties in addition to those referred to, was confirmed by the court, and a decree was entered ordering and directing the defendant to pay to the complainant the sum of $912.50.

It is insisted on behalf of the complainant that during the course of the somewhat intricate proceedings had in the trial of the cause in the Circuit Court and before the

master, different chancellors had found in favor of the contentions of the complainant, as did also, it is asserted, the master to whom the cause had been referred. No useful purpose would be served by discussing the different orders of xxx and the position taken upon the issues at different times by the court below. It is true that at least one of the chancellors who had passed upon the questions here argued, did find with the contention made by the complainant. On request of the master above referred to, the court, by supplemental order, directed the master to hear testimony and report his findings and conclusions as to the disposition and use by the defendant of the partnership assets and property in his possession after February 1, 1903, and as to all profits derived by the defendant, if any, from such use by him of these assets, after the dissolution of the partnership. The chancellor who entered the decree stated, at the end of the oral argument in the cause, that he felt bound by the findings and conclusions of the chancellor who had entered the supplemental order of reference above referred to. On subsequent oral argument, however, he became convinced that he was not bound by the findings and conclusions reached by another chancellor, and he entered a final decree in the suit as above indicated.

The point is made that the bill does not charge, and that the evidence taken by the master does not show that a partnership existed between the parties. In view of what is said hereinafter, it will not be necessary to discuss this question, further than to say we believe that the evidence satisfactorily shows that the parties, following the agreement of May 1, 1902, had transacted a partnership business as alleged in the bill.

Whatever may be said of the course of the proceedings in the court below, there is fairly presented to us for decision

judge in the suit.

The point is made that the suit must not simply, and since the evidence taken at the recital does not show that a particularly serious defect in the testator's mental capacity, it will not be necessary to discuss the matter further. In view of what is contained in the affidavit, I am satisfied that the testator knew and approved of the contents of the will.

Counsel for the plaintiff, in argument, submitted that the testator was not sane at the time of the execution of the will, and that the execution was not properly witnessed. Counsel, he submitted, had failed to establish that the testator was of sound mind, memory and understanding at the time of the execution of the will. Counsel for the defendant, on the other hand, submitted that the testator was sane at the time of the execution of the will, and that the will was properly executed and witnessed.

The evidence in support of the plaintiff's case consisted of the testimony of the plaintiff herself, and that of her husband, Mr. Justice Kingsley Fairbairn, and Dr. Ian Kelly, a psychiatrist. The defendant called Dr. Kelly, Miss Ann Mae Hagan, the attorney who had prepared the will, and Mr. Justice Fairbairn. Dr. Kelly, who had examined the testatrix on the 1st July, 1969, was therefore a fortnight previous to the execution of the will, was questioned at length by counsel for the plaintiff, and stated that in his opinion, the testatrix was not capable of understanding the nature and effect of the will at the time of its execution. He was of the opinion that she was suffering from a mental disorder, namely, senile dementia, and that this condition had existed for some time prior to the execution of the will. He stated that the testatrix was not capable of understanding the nature and effect of the will at the time of its execution. He was of the opinion that she was suffering from a mental disorder, namely, senile dementia, and that this condition had existed for some time prior to the execution of the will. He stated that the testatrix was not capable of understanding the nature and effect of the will at the time of its execution.

the two principal questions in controversy between the parties. The first is whether the copartnership agreement between the parties had been dissolved by mutual agreement in November, 1902. The evidence taken before the master shows that following the organization of the partnership Nowak and Geist had made unsuccessful efforts to acquire franchise rights in one or two localities in the State of Indiana; that following this failure Nowak, Geist and one Wood, an attorney, on November 2, 1902, had entered into a 60 day option contract for the purchase of all of the stock of the Hammond Illuminating Company, and they paid thereon the sum of $5,000, of which sum Geist and Nowak paid $1,250 each and Wood paid $2,500. After the execution of this contract Geist and Nowak did considerable work and incurred some expense in an effort to secure certain franchises in the cities of Whiting, East Chicago and Indiana Harbor, in the State of Indiana. These franchises were finally secured, and they were taken in the name of Geist.

Much argument was had as to whether the franchises referred to were included in the partnership agreement of the parties, or whether they were to be regarded as the individual property of the defendant. We think that when consideration is given to the time, manner and circumstances under which these franchises were acquired, it may reasonably be held that the acquirement of them inured to the benefit of the copartnership.

The evidence tends to show that Geist and Nowak were not men of large means; they had between them a one-half interest in the option contract, and as the time for the exercise of the option was about to expire it became necessary to immediately procure some person or persons with sufficient capital to take over the option contract and finance the operations of the Hammond Company. The firm of Granger, Farwell & Co., of

Chicago, bankers, was appealed to by Wood to aid the owners of the option contract in the consummation of the purchase of the Hammond Company and stock and the operations necessary under the franchises referred to. This firm agreed to enter the enterprise and to furnish therefor three-fourths of all the necessary capital, the other fourth to be subscribed by the owners of the option contract. Geist testified that Wood had secured a tentative proposition from Farwell & Co. under which Nowak and Geist would have to raise $83,000; that he, Geist, went to Nowak and his father and told them that this amount would have to be raised, and that the Nowaks said that they would not obligate themselves to that amount. Nowak and his father denied that this conversation ever occurred. Geist also testified that he and Wood, about October 10th, called on Nowak at his office and restated the Farwell proposition, and that at that time the complainant, Nowak, said: "'Gentlemen I cannot obligate myself to that amount; if you will give me my money back I will get out of the deal,' and I said, 'all right, Charles, I will give you your money back.'" Geist's version of these two conversations is corroborated in main particulars by the testimony of Wood. When on the witness stand before the chancellor, Wood testified that Geist at the latter conversation said to Nowak, "'Very well, you will be satisfied if you get your money back and Wood and myself go on with it,' and Nowak said 'that he would'"; that Geist thereupon said that he would give Nowak back his money. Testifying later before the master, Wood also said that Nowak at the latter conversation turned to Geist and said, "You can count me out";

that thereupon he, Wood, advised Geist, as his lawyer, that Nowak was out of the Hammond deal.

These conversations occurred in the early part of October, 1902. Thereafter, sometime in November, the exact date being in dispute, the defendant, Geist, called at the office of Nowak and his father, and gave to the father the sum of $1,375, which he asked him to deliver to the complainant. At this time the complainant was out of town on a wedding trip, from which he returned to Chicago in the early part of December, 1902.

Granger Farwell also testified as a witness in the case, and his testimony tends to corroborate in some slight degree the testimony of Geist and Wood. Nowak denies specifically that he ever had any such conversations with Geist. He testified that after his return from his wedding trip he talked with Geist about the matter, and that Geist had repeatedly promised to render an account to him of his dealings in the partnership assets. It seems to be conceded that the $1,375 was paid to the elder Nowak by Geist, and, so far as this record shows, the money was received and retained by the complainant.

The Farwell Company deal was not consummated, and Geist appealed to one Rufus Dawes to aid him in financing the Hammond deal. Dawes and others took over the option contract.

Whether the refusal of Nowak to contribute further funds to the partnership business finally resulted, in October or the early part of November, in a dissolution of the partnership, was a very much disputed question of fact before the master and the trial court. The parties sharply contradict each other with reference to the holding of these conversations and what was said therein. There was evidence

heard fairly sustaining the contention of either party with reference to this question. If the testimony of Geist, Wood and Farwell is to be believed, we think there is sufficient evidence in the record to warrant the conclusion that the partnership in question was in fact dissolved by mutual agreement of the parties at the time that Nowak is said to have agreed to receive from Geist all the money that Nowak had paid into the partnership business.

Nowak's contention is that even if the testimony of Geist and Wood be accepted as true, it shows on its face that the parties had in mind only the Farwell deal. The Farwell deal never was consummated. We think it is more reasonable to conclude, from what was said by the parties and the conduct of Nowak in receiving the money and retaining it at the time in question, that it was their intention to dissolve the partnership, and that Geist was to be permitted to deal with the option contract free of the interest of Nowak. This court has had no opportunity to see the witnesses and to hear their testimony and hence, under the circumstances, we cannot say that the partnership was not dissolved at the time in question.

The master in his report found that six years after the partnership had been dissolved, the defendant obtained large profits by the organization of a company known as the Northern Indiana Gas & Electric Company, which company took over certain other companies, among them the South Shore Gas & Electric Company, of whose capital stock the defendant held 3,428 shares, for which he had given the 600 shares of stock referred to, of the Hammond Illuminating Company. The master found that the South Shore Gas & Electric Company was a reorganization of the Hammond Company in December, 1903.

Complainant concedes that the dissolution of the

copartnership did take place February 1, 1903; at that time the defendant had possession of only the 600 shares of stock received by him in December from Rufus Dawes. At the time of the Dawes deal Geist was paid in cash the amount of money expended in procuring the option contract, and out of this sum he paid to Nowak the $1,575 referred to. The master found that the 600 shares of stock were all of the partnership assets in existence at the time of the dissolution on February 1st, and that this stock was not worth more than the sum that Geist had paid for it, $14,352. The master further found that aside from this there was due the complainant $912.50 from the defendant, representing, as we understand the facts, the amount paid into the copartnership by the complainant in excess of the $1,575 delivered to him by the defendant.

In the supplemental order of reference above referred to the court reserved all rulings upon exceptions and objections to the master's report until the coming in of the completed report to be filed in the cause. Whatever may have been in the mind of the judge who entered this order, at the time it was entered, it is clear to us that under the pleadings in the cause an accounting should have been directed as of the date when the partnership was found to have been dissolved. We are inclined, as stated, to believe that there was sufficient evidence to warrant the finding that the partnership in question was in fact dissolved in November, following the collapse of the Granger Farwell & Co. deal; but whether we be correct in this finding or not, it seems perfectly clear that the accounting should not have been extended beyond February 1, 1903, at which time the plaintiff insists the partnership agreement became dissolved by mutual consent of the parties.

The bill filed by complainant is one which seeks a partnership accounting only; it is not predicated

upon fraudulent or deceitful conduct upon the part of the defendant; no facts are alleged from which it can be presumed that the defendant was guilty of any fraud in connection with the partnership dealings whatsoever. The fact that it is alleged in the bill that the complainant became dissatisfied with the conduct of defendant as a partner, will not be urged, of course, as a sufficient allegation of fraud to charge the defendant as a trustee ex maleficio. The only other charge in the bill pertaining to fraud, is, that the defendant had fraudulently refused to account to complainant after the dissolution of the partnership. This allegation is not sufficient to charge the defendant with such wrongdoing as would authorize the kind of accounting sought in this suit by the complainant.

The authorities are in accord upon the proposition that where a bill merely seeks a partnership accounting as between partners, then each partner becomes a debtor to the others to the extent of the partnership property in his possession or under his control at the time of the dissolution of the partnership. Geist, in this case, in the absence of sufficient allegations of fraud, must be held to have been a debtor to the partnership to the extent of the value of its assets which he had in his possession either in October or November, 1902, or the first of February, 1903, and as we view the facts of the case, it is not important whether it be held that the partnership was in fact dissolved on the one date or the other. If it be determined that the partnership was dissolved as of the date of the so-called "count me out" conversation, then all that complainant would be entitled to would be the amount of money he had expended in the partnership business. So, also, if it be held that the partnership dissolution took place as of February 1, 1903, the same re-

sult in effect must follow, for the reason that the 600 shares of stock acquired by Geist between these two dates were of no greater value than the amount which he paid for them. If Geist did conceal his dealings with Dawes, he had a right to do so if the partnership in fact had been dissolved before these dealings had been begun.

No fiduciary relationship existed between the parties after the dissolution of the partnership. Each became a debtor to the other to the extent that each held partnership assets. Fraud was not sufficiently alleged in the bill to charge the defendant as a trustee ex maleficio; that issue was not presented by the pleadings; his mere refusal to account after dissolution is to be regarded merely as a refusal to pay a debt; it was not a refusal on his part to perform a duty imposed upon him by a fiduciary obligation. On this question counsel for complainant stated in open court, referring to the date of February 1, 1903, that he made no claims for anything after that time.

Whether or not this statement of counsel may be taken as an admission of record binding upon his client, it is clear that it states the only theory upon which the cause should have been tried under the pleadings.

In Ryder v. Ryder, 244 Ill. 207, the court said:

> "The mere refusal of a trustee to execute an express trust, or denial of existence of the trust by the trustee, does not constitute such fraud as takes the case out of the statute. * * * In order to raise a trust ex maleficio there must be an element of positive fraud in the transaction."

And in Davis v. Strawbaugh, 163 Ill., on page 564, the court said:

> "In order to take the case out of the statute and establish a trust ex maleficio the transaction by means of which the ownership of property is obtained must be, in fact, a scheme of actual deceit, - in other words, there must be an element of positive fraud accompanying the promise and by means of which the acquisition of the legal title is wrongfully consummated."

In Lindley on Partnership, 2nd Ed., sec. 326, the author says:

> "As regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners."

In Ligare v. Peacock, 109 Ill. 94, the court, in dealing with the duty which the law imposes upon a partner to account, says:

> "He must be charged with and account for the goods and stores, the logs, and all other personal property at the mills at the time of the dissolution of the partnership, and all money due the firm and collected by him, with interest on these several sums from the time of the dissolution. He will be credited with any sum he may have paid on debts owing by the firm."

We are inclined to the view that the authorities sustain the contention of the defendant that the accounting should have been had as of the date of the dissolution of the copartnership in question. There is evidence in the record which sustains the contention that this dissolution took place in October, and before Geist, the defendant, obtained possession of the 600 shares of stock of the Hammond Illuminating Company; even if it be held that the dissolution took place as of February 1, 1903, the decree of the Circuit Court is correct, in that the evidence heard by the master does not prove that the 600 shares of stock, the then only assets of the copartnership, were worth more than the defendant had in fact paid for them.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

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MARTIN CURRAN,
Appellee,

vs.

WELLS BROTHERS COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 307

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior Court against the defendant in an action of trespass on the case; a verdict and judgment were entered in favor of the plaintiff for the sum of $3,000, and defendant brings the case here by appeal for review.

The declaration consists of two counts; the first charges that the plaintiff was in the employ of defendant as a common laborer in the construction of a building in Chicago; that in doing his work plaintiff was required to go upon a scaffold situated about 15 feet above the ground, and that the defendant negligently permitted planks of the platform in the scaffold to remain insufficiently fastened, as the result of which one of such planks fell upon the plaintiff while he was working under the scaffold, thereby injuring him. The second count of the declaration is essentially the same as the first, except that it charges that it became the duty of the defendant, under the statute of the State of Illinois, to erect "such scaffold in a safe, suitable and proper manner."

The defendant filed a plea of the general issue, and also special pleas setting up the Workmen's Compensation Act in force May 1, 1912, and it alleged in said pleas that the defendant had elected to pay compen-

[illegible]

[illegible]

[illegible]

sation under the act. The essential part of the reply of plaintiff to the special pleas is as follows:

> "that the defendant did not, as by said Workmen's Compensation Act required, before the happening of the injury to the plaintiff, furnish to the plaintiff personally at the time of hiring the plaintiff as an employe of the defendant as aforesaid, or any other time, or post before the happening of the said injury to the plaintiff in a conspicuous place at the said plant, room or place where the plaintiff was to be employed and was employed as aforesaid, a legible statement of the compensation provisions of the said Workmen's Compensation Act in defendant's said plea mentioned."

It is contended on behalf of the defendant that the employment of plaintiff by defendant was within the employments enumerated in the Workmen's Compensation Act of 1911, and that the only remedy of the plaintiff for the injuries complained of is that provided by the Compensation Act. It is urged that a judgment for the plaintiff cannot be sustained where there was no averment in the declaration that the parties were not under the Act. In both counts of the declaration the plaintiff alleged that he was at the time of the accident an employe of the defendant.

In bringing his suit plaintiff relies upon his common law right of action for the injuries he received; he is not urging in his own behalf any special right or privilege granted to him as an employe under the Compensation Act of 1911. He insists that neither he nor his employer, the defendant, were under the Compensation Act because of the failure of the employer to post the notices required by the act; but defendant contends that it was the duty of the plaintiff to allege in his declaration facts which would take both plaintiff and defendant out of the operation of the Compensation Act. Under the pleadings in the case, it is not neccary to consider this question. If the declaration

filed by the plaintiff were insufficient, in that it showed upon its face that the plaintiff was an employe of defendant in one of the occupations enumerated in the Act, and, hence, was presumably under the Act, and if the declaration contained no allegations that defendant was not liable under the Act, defendant could have presented this question for decision in the trial court by filing a demurrer to the declaration. This it failed to do; it filed the plea of the general issue and also two special pleas, to which a replication was filed by plaintiff. Under this state of the pleadings it must be held that the defendant waived its right to present the question at this time in this court. The issue of whether the parties were or were not under the Act was presented under the pleadings adopted by the parties without the objection of either or a ruling thereon by the trial court; this puts an end to the matter so far as we are concerned.

In Von-Boeckmann v. Corn Products Co., 274 Ill. 605, the Supreme Court held that where a defendant relied upon the Compensation Act as a defense to an action under the Factory Act, such defense need not be specially pleaded by the defendant, and that it could be made under the plea of the general issue.

It is also urged by counsel for the defendant that plaintiff should have alleged in his declaration that the failure on the part of the defendant to comply with the provisions of the Compensation Act relied on in the second count, was an act of omission by an elective officer of defendant. There is no merit in this contention; this suit is not brought under the Compensation Act. The theory of plaintiff is that the defendant has never brought itself under the Act because of its failure to post notices, etc.,

as required by the Act. And it is not contended that the Compensation Act does not apply to the facts of the case for any other reason.

It is shown by the evidence that the defendant is a contractor and that it has built several large buildings in the city of Chicago. The plaintiff was employed at different times by the defendant, and on different buildings. It is insisted by the plaintiff that when his work ceased upon a particular building in the course of construction by the defendant, his relations to the defendant as an employe ceased, and that it was incumbent upon him in each instance thereafter to seek a new employment with defendant. Plaintiff testified that he came to this country from Ireland in 1910, and that the accident in which he sustained the injuries complained of occurred December 10, 1912; that he came to Chicago in the year 1911; that his first work in Chicago was with the defendant, Wells Brothers Company; that he was thereafter employed by the Thompson-Starrett Company, also by Griffiths & Son, and by a man named Setter; that he had worked more than once with these different contractors; that he would work on one job for three or four weeks and would then be laid off, and that he would look for another job with any contractor who might be in need of help. Plaintiff was a laborer, and in testifying he related at length his different employments for different contractors and upon the several buildings during his residence in Chicago prior to the time of the accident.

It seems to be undisputed that plaintiff was employed by the defendant in the early part of November, 1912. Thereafter he was employed by defendant for three days on the Butler Bros. building. On November 25, 1912, and until the date of the accident, he worked for the de-

fendant on the Rosenwald & Weil building.

In support of the allegations of his replication the plaintiff introduced a number of witnesses who testified that no notices of any sort were posted by the defendant in or upon the Rosenwald & Weil building which it was constructing. Plaintiff denied that he had ever seen notices upon this building during the time he was employed there; on the other hand a number of witnesses testified for defendant that such notices had been posted on the building by the defendant. There is much evidence in this record touching this matter of posting notices; eight witnesses testified on behalf of the plaintiff and six on behalf of the defendant in connection therewith. We have examined the testimony given by these witnesses, and, while it is directly contradictory, we are of the opinion that there was sufficient evidence heard to warrant the jury in finding, as it evidently did, that the notices had not in fact been posted upon the building in compliance with the statute.

It is urged, however, by counsel for defendant that even if it be conceded that such notices were not posted on the Rosenwald & Weil building, the plaintiff is in no position to avail himself of this fact for the reason that notices had been posted upon the Butler Bros. building, which defendant was also constructing during November, 1912, and whereon, it was contended by defendant that plaintiff was also employed. It seems to be conceded that plaintiff was employed upon the Butler Bros. building from November 19, 1912 to November 22, 1912. A sharp contro-

versy occurs as to whether the plaintiff was transferred from the Butler Bros. building by an authorized agent of the defendant to the Rosenwald & Weil building, or whether he was discharged from work as an employe for defendant on the Butler Bros. building, and thereafter sought and obtained employment for the defendant upon the Rosenwald & Weil building on November 25th. Plaintiff testified that he was discharged. A witness for the plaintiff, an employe of the defendant, testified: "There is no such thing as transferring us with Wells Brothers; when we were laid off a job we had to go and hunt up something else." Another witness testified: "When I worked for Wells Brothers I would work on a job for three or four weeks; then they would lay us off and we would look for another job with any other contractor where we could get work." Testifying in his own behalf the plaintiff said: "When I worked for Wells Brothers on the Sears-Roebuck job and on different buildings for Wells Brothers I was laid off each time and I would go to some other place and ask for a job. I would work for whatever contractor I could get a day's work. On this particular job where the plank fell on me I was hired right there on the job."

Ryan, superintendent and witness for defendant, testified that, "The foreman on the Rosenwald & Weil job wanted a few good men, handy laborers; so I went down to the Butler Bros. job and told the foreman to pick out a couple of good laborers and send them up there. He pointed out Curran (the plaintiff) to me and said he was the only one he could spare. I told Curran to come along and go to the Rosenwald & Weil job." It appears that the witness Ryan was general superintendent for the defendant of all its construction work in Chicago; that he had super-

vision of more than 1,000 men, and that 500 or 600 men were employed on the Butler Bros. building alone; and it also appears from his testimony that his attention had not been called to the incident of his transferring Curran to the Rosenwald & Weil building until the night before the day he testified at the trial. Curran in fact did not go to the Rosenwald & Weil job until November 25th.

In contradiction of Ryan's testimony, McNamara, the labor foreman on the Rosenwald & Weil job, testified: "I hired Martin Curran on the Rosenwald & Weil job; he asked me for a job and I put him to work. Mr. Ryan never told me that he was transferring or would transfer or had transferred Martin Curran from the Butler Bros. building. * * I did not talk to Ryan about needing men because I did not have to."

We are of the opinion that there was sufficient evidence heard on the trial to sustain the contention of plaintiff that he had been discharged from his employment on the Butler Bros. building and that he had been re-employed by the defendant three days thereafter on the Rosenwald & Weil building. Time sheets were introduced in evidence by the defendant in support of its claim that the employment of plaintiff was continuous, but we do not think they were by any means conclusive of the question.

The alleged failure of the defendant to furnish the plaintiff with a statement and to post notices as provided by the Act, sec. 1, sub-sec. 3, par. "c", is set forth in plaintiff's replication above referred to. It is insisted, however, that this proviso requires notice to be posted only in cases where an employe shall file a notice with the secretary of the State Bureau of Labor Statistics that he does not intend to be bound by the Act.

The whole of paragraph "c" is as follows:

> "c. In the event any employer elects to provide and pay compensation provided in this act, then every employe of said employer, as a part of his contract of hiring, or who may be employed at the time of the taking effect of this act, and the acceptance of its provisions by the employer, shall be deemed to have accepted all the provisions of this act and shall be bound thereby unless within thirty days after such hiring and after the taking effect of this act he shall file a notice to the contrary with the secretary of the State Bureau of Labor Statistics, whose duty it shall be to immediately notify the employer, and if so notified, the employer shall not be deprived of any of his common law or statutory defenses, and until such notice to the contrary is given to the employer the measure of liability of the employer for any injury shall be determined according to the compensation provisions of this act; Provided, however, that before any such employe shall be bound by the provisions of this act, his employer shall either furnish to such employe personally at the time of his hire, or post in a conspicuous place at the plant or room or place where such employe is to be employed, a legible statement of the compensation provisions of this act."

Under this paragraph an employe may choose not to be bound by the Act, but it is provided that such employe will be bound by the Act unless within thirty days after "such hiring and after the taking effect of this Act he shall file a notice to the contrary," etc., and it is insisted that the words, "before any such employe shall be bound by the provisions of this Act," relate only to such employes as may elect not to be bound by the Act by filing a notice as provided by the Act with the State Bureau of Labor Statistics. We do not agree with this contention. If the argument of counsel be correct, then there would be no reason at all for adding the proviso to the paragraph of the Act referred to; that proviso, in its nature, must have reference to employes generally, and particularly those who would otherwise be bound by the Act. Nothing would be saved, and no benefit would accrue to any employe by the proviso in question, who by his own act had elected not to be bound by the Act. The proviso is a limitation upon the right and

The wording of Section "e" is as follows:

"e. In the event any eligible elects to par-
ticipate in the Program, but the aggregate of the
amounts deducted or withheld from the pay of such em-
ployee during any period of service is less than the
amount of tuition, he may be assigned or the time of
that period of time, to pay the balance of the tuition
or all for making the display of the pay re-
ceived by; that failure, in the minor, may result
in cancellation of service by the employee. Should
the employee terminate his employment with the Service
before completion of this [illegible] he should be billed
immediately with the balance due after such tuition and
the total allowance of this act may be [illegible] re-
duced in the ratio that the monetary [illegible] re-
ceived by the employee with the monetary [illegible]
amount of tuition originally [illegible] bears to the
total [illegible] amount of tuition. [illegible]
[illegible] the employee [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]

liability of the employer, and for the benefit of employes who might otherwise come under the Act. It is clear that it was the purpose of the legislature not to permit an employer to claim any benefit under the Act in a suit brought by an employe, where he, the employer, had not complied with its provisions. The beneficial purpose of this paragraph was to notify employes that the employer was operating under the Act, and that employes could, if they saw fit to do so, protect their interests by filing a notice with the bureau mentioned, in case such employes should elect not to work under the Act.

> "A careful examination of all these cases will show that where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the Legislature as manifestly disclosed by a consideration of the whole context."
>
> The People v. Rose, 174 Ill. 316, 317.

It is true, in substance, as argued by counsel, that the words "aforesaid," "said," "their" and "such" will generally be referred to the last antecedent, but there is ample authority for the holding that this rule will not be strictly applied where such application would result in destroying or materially altering the intention of the legislature as expressed in the whole context of the language under consideration. Paragraph "c" above quoted consists of one sentence, and we are inclined to the view that the words "such employe" relate to and modify the words "every employe of said employer," and that when the proviso in question is construed with the whole context of the paragraph of which it is a part, it is clearly apparent that the legislature meant that no employe would be bound by the Act in cases where the employer had not furnished a statement or posted notices as required by the proviso.

In People v. McMurray, 147 App. 248, relied upon by defendant, the court said:

> "It is a general rule of law that a provision or exception in a law relates only to the paragraph or distinct portion of the enactment which immediately precedes it, unless a different construction be necessary to carry into effect the evident intention of the legislature in passing it, as such intention appears from the whole act."
>
> "A word may be referred to the only antecedent which can make sense of it." R. v. Wright, 1 A. & E. 448.
>
> "Every interpretation that leads to an absurdity ought to be rejected." Vattels' Rules.

To hold that the proviso in question applies only to such employes as, for other reasons and by their own election, would not come under the Act, would be to render the proviso meaningless. As to such employes, paragraph "c" of the Act gave them the privilege of refusing to come under the Act. Now, then, in case where this right was exercised by an employe, could the proviso have any possible relation to him? Where an employe takes himself out of the operation of the Act, there can remain no reason for provisos in the Act which would have merely the same effect upon the rights of such employe as would result from his own voluntary conduct.

Complaint is made of the rulings of the trial court on the admission of evidence, as to which we do not think such error occurred as would warrant a reversal of the judgment.

It is also insisted that the court erred in the giving and refusing to give to the jury certain instructions. We do not think any reversible error was committed by the trial court in this particular.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

205/309

296 - 32736

Filed April 16, 1917

205 I.A. 309

EDWARD J. [illegible], a minor, by Louis F. Lattimer, his next friend,

Appellee,

vs.

LARINA CHASE,

Appellant.

Mr. Justice [illegible] delivered the opinion of the Court.

This is an appeal from a judgment of the Municipal Court in favor of the plaintiff and against the defendant for the sum of $200.

Plaintiff, Edward J. Lattimer, a boy six years of age, sustained injuries caused by a fall from the rear porch at the second floor of a building owned by defendant, located at No. 157 [illegible] Street. The building was a three-story brick [illegible], containing three six room apartments, of which the plaintiff's family occupied the upper or third apartment, the defendant's family occupied the first, and the middle apartment was occupied by a family named Hayes. The building fronts north, and front porches were [illegible] to the rear or south end. These porches were each about 8 feet long and 10 feet wide and were connected by a stairway reaching from the ground level to the porch at the third floor. The floors of the porches were about level with the floors of the several apartments, and the entrances to the apartments were at the east end of the porches.

It is contended that the plaintiff fell from the second porch, at which the fall [illegible] the entry of a third apartment which [illegible] the south railing of the second porch [illegible]

On the day of the accident plaintiff, with two or three other small children, was playing about the second porch; he leaned against the board in question and it gave way and he fell to the ground, a distance of about twelve feet. Witnesses testified that immediately after the accident they examined the board, which fell with the plaintiff; that they found it was rotten and eaten away at the ends, and that the nails which held it were rusty. The evidence on the whole fairly tended to prove that the accident was caused by reason of the defective and out-of-repair condition of the west side of the porch on the second floor, near its west end. For some time prior to the accident a wooden bench had been placed against this part of the railing, but for some reason it had been removed a day or two before the occurrence in question.

It is insisted by counsel for the defendant that the defendant is not legally responsible for the injuries which the plaintiff sustained; that the part of the second porch from which plaintiff fell was not in the possession of or under the control of the defendant; that it was part of the premises demised to the tenant who occupied the second floor, and that no legal duty was imposed by the law upon the defendant to keep this part of the porch in repair.

It is shown by the evidence in the record that one approaching either of the floors of the building from the ground level by using the rear stairway, would necessarily be required to use the part of the porch from which plaintiff fell. Notwithstanding this fact, we are inclined, under the circumstances of this case, to hold that the first and second porches attached to the rear of this building should be regarded as a common way which it was the duty of

the owner of the building to keep it in a reasonably safe condition for such persons as might have a legal right to use the same. No degree of extra care can be said to be used of the kind or upon floor of the building, where not occupied by the plaintiff's tenants, such as was the second porch and connecting stairway.

Adding to us to do, that the second porch, at least in part, a common way under the previous [illegible] of the tenants in possession of the other apartments of the building, the court cannot rule initially on the ground that that part of the porch where plaintiff fell, which was only a few feet away from the stair openings, was in the exclusive control and possession of the tenant of the second floor. [illegible] fairly tends to show that the floor of the building [illegible] with reason expect just such accident to occur on the [illegible], from the dangerous condition in which the stairs were left. The building in question can not [illegible] be called a tenement house, and the duty imposed upon the owner of such building to keep the [illegible] in a reasonably safe condition is quite [illegible] duty imposed upon him to keep the common hallways and stairways in the case of such buildings, free from defects and traps which might hurt and endanger children living in the building.

Counsel for the parties have called our attention to many authorities touching the liability of the owner of a building for failure to keep an [illegible] condition were used in common by tenants of such buildings.

The right of plaintiff's family to use the second porch was appurtenant to their right to use and occupy the third floor of the building. The plaintiff had a right to use the second porch in going to and from his home, and we are inclined to the view that the owner, whose duty it was to keep this common way in repair, might reasonably have anticipated that a child of nine years of age might, with that inattentiveness characteristic of children of that age, stop to play about the second porch at the second floor.

The case of Bonyo v. Lorenz, 161 Ill. App. 536, relied upon by defendant, does clearly construed to, we think, an authority in favor of the plaintiff. It should be borne in mind that while he was driving over a defect in the second porch, it was not there it an question but that the plaintiff had a right to use said porch in going to and from his place of residence. In the Bonyo case, supra, it was held on the facts of that case that no other tenant had the right to use the platform and stairs involved against the will or objection of the tenant of the third floor of the building, and this court held that with reference to the upper portion of the stairway, that is, that portion which led from the second to the third floor, it not being a common way but used exclusively by the tenant of the third floor, only the defendant was under a legal obligation to keep it in repair.

In Bonyo v. Lathrop, 167 Ill. App. 1, the court says:

> "It applied to a stairway or [illegible] of the building which were under the control of exclusively by tenants, and from which by reason of [illegible] or agreement as to [illegible] excluded by some one entitled to the [illegible]

> the duty of appellant as owner to keep [illegible] and free from hazard and danger in plain and obvious relation."

It is also urged on behalf of the appellant that she had no notice of the out-of-repair and rotten condition of the plank in question. The evidence shows that the defendant resided on the premises. One Hutton, a tenant of the second floor, testified that before the accident in question she, the witness, had complained to the defendant of the condition of the porch; this was denied by the defendant. There was sufficient evidence introduced on the trial to warrant the jury in finding that the defendant had notice of the condition of the plank, or that by the exercise of reasonable care such notice could have been had by her.

The judgment of the municipal Court will be affirmed.

Affirmed.

299 - 22733

STAVROS PETROYEANIS,
Appellant,

vs.

A. B. PIROLA et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 310

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court dismissing complainant's bill for want of equity.

The bill alleged that on May 2, 1914, the complainant had recovered a judgment against the Chicago Railways Company and the A. B. Pirola Company for the sum of $5,000; that the Chicago Railways Company prosecuted an appeal from this judgment to this court; that while the appeal was pending, on April 10, 1915, the complainant and the Chicago Railways Company entered into an agreement, which was entitled "Covenant not to sue." This agreement provides in substance that in consideration of the payment by the Chicago Railways Company to the complainant of the sum of $3,000, the complainant agreed to take no action, either in law or equity, or to prosecute any writ of execution to obtain satisfaction of said judgment from the Chicago Railways Company, in any form or manner whatsoever; and in this instrument the complainant agreed to be forever precluded "from asserting any right against the said Chicago Railways Company he may have heretofore had to prosecute and collect his said claim for personal injuries to the undersigned against it." It is alleged in the bill that the $3,000 referred to was received by the complainant; that an execution was issued upon the judgment and a demand made by the sheriff upon the A. B. Pirola Company for

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[illegible]

V. E. LIGGIA de C.

Atlantic.

[illegible]

[illegible]

2052 I.A. 310

[illegible]

[illegible]

[illegible]

for the amount of the judgment; that the execution was returned "no part satisfied"; that there is still due the complainant on said judgment the sum of $2,000; that the judgment was the result of an action brought by the complainant against the defendants because of an accident which resulted in injuries to him on January 11, 1912. // The bill further alleged that the A. B. Pirola Company had attempted to wind up its affairs and business before the entry of the judgment in question in order to defraud the complainant; that the defendant A. B. Pirola was one of the stockholders of the Pirola Company; - but it does not appear in the abstract of record filed herein that Pirola was an officer of or that he had any other interest in the company than that of a stockholder. It is further alleged in the bill that Pirola, and several other persons who were made defendants, were in possession of property or moneys which equitably belonged to the A. B. Pirola Company, which property and moneys should be applied in satisfaction of the $2,000 which complainant alleges is the balance due upon his judgment.

Demurrers were filed by the defendants to the bill as amended, which demurrers were sustained by the court and the bill was dismissed for want of equity.

Several questions are argued by counsel for the complainant. The determination of one of these questions is, in our opinion, decisive of the right of complainant to the relief he prays for. It is our opinion that it appears on the face of the bill that the judgment in question has been satisfied and paid in full.

There can be no controversy about the right of one joint tort feasor to purchase his peace from threatened or pending litigation. Where a claimant has a

valid existing claim against several joint tort feasors, any one of such joint feasors may, by agreement with such claimant, purchase his peace without affecting the right of such claimant to bring an action against all the others against whom such action may lie. The theory upon which "covenants not to sue" contracts have been held valid, is that there is existing a claim the assertion of which might cause annoyance or expense to one of several against whom such claim is made. No such facts are shown by the bill to exist in the instant case. No assertion is made in the bill of complaint that the complainant has any claim against either the Chicago Railways Company or the A. B. Pirola Company which would furnish the basis for legal action. Such claim as the complainant has had against these defendants has been merged in a judgment, upon which complainant had the right to have execution issue and his judgment satisfied out of the property and assets of the defendants. This, as shown by the bill, was the legal status of the complainant and the two corporations in question at the time the bill herein was filed, except that the complainant had seen fit to accept the sum of $3,000 in consideration of his promise not to prosecute an execution on said judgment as against one of the judgment debtors.

Clearly the agreement alleged in the bill can not be regarded as a covenant not to sue, within the meaning of that term as used in agreements which have been held valid by the courts of review of this state. The bill shows that there was in fact, whatever the parties may have seen fit to entitle the agreement, a promise entered into by the complainant not to prosecute his existing right, as exemplified by the judgment, to have execution

issued and levied against property or assets of both defendants. There was not at the time this instrument was made and entered into any matter in controversy between the parties thereto; the cause of action had been merged in a judgment, which judgment we think was satisfied by the acceptance by complainant of the sum of $3,000, and that the instrument in question must be regarded as a release and payment of the judgment as against both the A. B. Pirola Company and the Chicago Railways Company. It is clear that this was not the intent of the parties, as expressed by the instrument, but notwithstanding this a "covenant not to sue" can have no application to a case where suit has in fact been brought and judgment entered against one of the parties to such agreement.

The bill discloses that the complainant, at the time he entered into the agreement with the Chicago Railways Company, did not have or pretend to have any existing claim upon which he would have a right to bring suit; his claim against the Chicago Railways Company had been reduced to a judgment. Complainant had not prayed an appeal from this judgment; he had not sued out a writ of error to procure a reversal of it; and it is fairly inferable from the bill itself that complainant had chosen to be satisfied with the entry of the judgment in question in his favor.

The general rule is that there can be no contribution between joint tort feasors, and that a release of the liability of one of them will inure to the benefit of the others; and this rule is applicable before suit is brought, after suit is brought and pending judgment, and after judgment has been entered, in cases where tortious conduct is made the basis of a claim or action.

We are inclined to think that there is much merit in the contention of counsel for the defendants that the Chicago Railways Company should have been made a party defendant to the bill. The bill is based on a claim of a valid judgment against both defendants in the common law proceedings. It is true the bill asserts that by agreement the complainant had promised not to endeavor to collect any part of the judgment against one of the defendants. The judgment is a unit; it is valid and enforcible against all or none of the defendants, and, while the question is not without difficulty, we are inclined to the view, in that by his bill the complainant is endeavoring to enforce the judgment against one of the parties thereto, and that he seeks by what we regard as a creditor's bill the discovery of assets of one of such defendants with which to satisfy the judgment, that he is compelled to show affirmatively in his bill why his judgment was not or is not enforcible against both defendants in the common law action. Creditors' bills are based upon the theory that a judgment creditor has made a bona fide attempt to have his judgment satisfied on execution against all of the judgment debtors; we prefer, however, to rest our decision upon the determination reached by us that the alleged covenant not to sue amounted to a release of both judgment debtors.

The decree of the Superior Court will be affirmed.

AFFIRMED.

303 - 22737

AUGUST FRANZEN,
Complainant,

vs.

CHICAGO STOCK YARDS & TRANSIT COMPANY et al. (Defendants)

JOHN S. LEVEL,
Cross-Complainant,

vs.

CHICAGO STOCK YARDS & TRANSIT COMPANY et al. (Defendants)

URBAN A. LAVERY,
(Intervening Petitioner)
Appellee,

vs.

C. S. BELLAMY,
(Defendant)
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

205 I.A. 313

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County. Complainant filed a bill in equity to foreclose a trust deed given to secure the payment of twenty-five 25 notes of the face value of $25,000. John S. Level filed a cross-bill in the proceeding, in which he set up title and ownership of one of said notes. A final decree was entered in the cause on February 5, 1916, which decree found, inter alia, that Level had a lien upon the property described in the trust deed for the sum of $1,000, and a decree was entered in his favor in the cause for the sum of $1,213.88. In pursuance of the decree the property in question was sold by a master, who in his report found that Level was entitled to the sum of $720.91 out of the money received from such sale, and to a deficiency decree

205 1.4.313

for the sum of $505.41.

Following the entry of this decree and the sale of the property, Urban A. Lavery filed an intervening petition in which he set up that he was entitled to $625 of the money in the hands of the master which under the decree in the cause would otherwise be the money of Level. The appellant, C. S. Bellamy, filed an answer to this petition in which she alleged that on February 7, 1916, she purchased all the right, title and interest of Level in the decree for a good and [illegible] consideration, without any notice of any equities existing in favor of Lavery or any one else; that on said date Level, by assignment in writing, transferred all his right, title and interest in the decree to her, which assignment was filed in the Circuit Court on the 30th day of March, 1916.

The pleadings and record disclose that on November 22, 1915, Level assigned his interest in the subject-matter of the foreclosure suit to Lavery; this assignment is in writing and is in the form of a letter to Carl Tourje, his, Level's attorney, the material part of which letter is as follows:

> "I hereby direct and authorize you to retain out of any moneys that may come to me in the foreclosure suit, known as Franzke vs. Chicago Stock Yards & Transit Company now pending in the Circuit Court of this County, the sum of Six Hundred and Twenty-five ($625) Dollars, being the amount of judgment and costs in the suit of M. H. Bohreer against myself in the Municipal Court of Chicago.
>
> "In furtherance of this agreement I hereby set over, sell and assign unto the said Urban Lavery, as attorney for the said M. H. Bohreer, all my right, title and interest in and to my claim in the said suit of Franzke vs. Chicago Stock Yards & Transit Company up to the amount of Six Hundred and Twenty-five ($625) Dollars aforesaid; it being my understanding and agreement that the said sum of Six Hundred and Twenty-five ($625) Dollars shall be paid to the said Urban Lavery, as attorney for the said M. H. Bohreer, immediately upon

for the year of 1939-41.

Following the expiry of this decree and the
ecie of the Treasury, Simon v. Inwald files an interesting
position in which he set out to use his position to help
of the Bonnd in the course of the coming union under the de-
clare in the above said statutes of the Board of Trade.
The Chairman, S. S. Delaney, filed an answer in this be-
alties in which he alleged that on January 7, 1938, one
burdened all the right, title and interest of Israf in the
decree for a perpetual injunction, damages and
notice of any sanction intended to favor of Israfy or any
one else; that to said date Israf, by assignment in writ-
ing, transferred all its right, title and interest in the
before to pay, which obligation was filed in the Circuit
Court on the 30th day of June, 1939.

The plaintiffs and record disclose that on
November 29, 1939, Israf assigned his interest in the mo-
ney-matter of the interference suit to Israfy; this motion
ment is in writing and is in the form of a letter to Chief
Counsel, Sir, Israf's attorney, the assistant Chief Counsel
Patent is as follows:

[illegible]

the said money being paid to you as my attorney, and for this purpose I have assigned the said sum as aforesaid, it being my intention to transfer and give at this time a complete and present title to the said suit of Franzke vs. Chicago Stock Yards & Transit Company to the said Urban Lavery, as attorney, up to the amount of the claim of the said M. M. Bonreer, as above set out.

"This letter is made in duplicate and I request that you mark one copy with your approval and return to the said Urban Lavery."

The record discloses that on February 7, 1916, Level again assigned all of his interest in the decree, which was rendered on February 5, 1916, to the defendant, C. A. Bellamy. While the record shows that the assignment to Lavery was first in point of time, it does not disclose that C. A. Bellamy had any notice of such assignment until after the 7th day of February, when she also received an assignment from Level of his interest in the decree.

It is urged on behalf of the appellant that the assignment to Lavery did not convey Level's title to the decree in question as against her assignment of February 7, 1916, for the reason that at the time of the Lavery assignment the note which formed the basis of Level's interest in the subsequent decree had not been merged in the decree, and that the assignment to Lavery was invalid because it depended upon the happening of a future event. We do not think there is merit in either contention. There was no attempt made by Level to assign the note; it was then over due, and constituted in part the subject-matter of the foreclosure proceedings. The assignment very specifically refers to whatever interest Level might then have in any decree that might be entered in the foreclosure proceedings. It was an assignment not of the note but of the claim of Level in whatever decree might be entered in the cause, to the extent of $625. From a reading of this assignment it is clear that Level intended to transfer to Lavery a present

equitable interest in whatever decree might be rendered in the cause in Level's favor. Had no decree been entered in the cause Lavery would have taken nothing by his assignment, not because of a lack of consideration at the time of the execution of the assignment, but because of a failure of consideration occurring thereafter. It is obvious that there was no intent to transfer the note to Lavery, or any interest therein. It was in fact a legal transfer of a part of the assignor's right and title to chose in action, and, as said in Indiana Watch Co. v. Kirk, 118 Ill. App. 102, 102: "Each successive assignee of a chose in action takes it subject to the existing equities between the original assignor and his immediate assignee."

The appellant must be held to have accepted the assignment to her of Level's interest in the decree in question, subject to all the equities and rights then existing in prior assignees of the same fund.

There is some contrariety of opinion expressed in the authorities on this question, but there can be little doubt that the question has been settled by the Supreme Court of this State in favor of the contention that: "There is no place for the doctrine of bona fide purchase for value without notice, in the transfer of such a chose in action. Not only does any purchaser of a chose in action of this character take it subject to all equities of the original parties to the chose in action, but a second or subsequent assignee takes it subject to all equities existing between any prior assignor and assignee." Sutherland v. Reeve, 151 Ill. 384; Commercial National Bank v. Burch, 141 Ill. 519; Carr v. Waugh, 28 Ill. 418.

We do not think that the filing by appellant of her assignment in the Circuit Court aided in any way in giving to

such assignment a priority over that of Lavery. If his assignment was otherwise valid as against subsequent assignees, we are unable to see how his right and title to the fund in question could be affected by the filing in court of the assignment to appellant. Indiana Match Co. v. Kirk, 118 Ill. App. 102.

The decree of the Circuit Court is affirmed.

AFFIRMED.

310 - 22744

JOSEPH T. DELFOSSE,
Appellee,

vs.

ANNA N. KENDALL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 314

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Suit was brought by the plaintiff in the Municipal court against the defendant to recover on a promissory note dated June 10, 1914, for the sum of $1,575, due four months after date, bearing 6% interest, signed by the defendant, Anna N. Kendall, made payable to herself and by her endorsed. The defendant, in an affidavit of merits to the claim of plaintiff, set up that the note in question was obtained from her by one Henry H. Thomas, without consideration; that the plaintiff in the suit received the note from Thomas without consideration, and that he, the plaintiff, well knew that Thomas transferred the note to him to avoid a defense of fraud; that plaintiff took the note merely to collect, and to avoid a defense of fraud; that Thomas represented to the defendant that he would deposit the note in question with the Robinson Springs Company for the sole purpose of holding said note on deposit and that it would not be assigned; and that he, Thomas, transferred said note in violation of an agreement not to do so, and without the consent or authority of the defendant. Later, by leave of court, the defendant filed an amended affidavit of merits which set up, in substance, that she denied the execution and endorsement of the note sued upon,

and she denied that she signed, endorsed or delivered said note to the Robinson Springs Company.

At the close of all the evidence the trial court directed a verdict for the plaintiff for the sum of $1,737.49, which the jury returned accordingly; the defendant brings the case here by appeal for review.

It was disclosed by the evidence heard upon the trial that before the execution of the note in question the defendant had executed and delivered four other notes for different amounts to Thomas; that two of these notes were for the sum of $1,000 each, and two were for $1,500 each; that these notes were given to Thomas for the purpose of enabling him in some manner to use them in the transactions and business of the Robinson Springs Company. The defendant testified that Thomas had paid different amounts upon these notes, although she admitted that she had paid interest thereon to the Robinson Springs Company. Delfosse, the plaintiff, testified that he had procured by purchase one of the $1,500 notes, for a valuable consideration, eight months before the execution of the note in suit; that the original note for $1,500 ran for four months, and was renewed twice; that he had had another note for $2,500, executed by the defendant, which was paid; that when the $1,500 note which he had, and which he had received by endorsement from Thomas, came due, Thomas delivered to him the $1,575 note on which the suit is based, for the $1,500 note then held by the plaintiff.

On the trial the defendant sought to show that at the time she signed the $1,575 note Thomas had, by trickery and fraud, led her to believe that she was in fact executing a note for $500. An objection to this proof was sustained by the court. Mr. Stewart, counsel for the defendant, offered

to prove "that she intended to sign a $500 note and he (Thomas) showed it to her and she read it, and he took advantage of her attention being on her check and substituted the note sued upon here and she signed believing she was signing a $500 note she had read." The court refused to let in this evidence, on the ground that no such issue was made by the pleadings in the case, and the correctness of the court's ruling in this particular is the question which we are called upon to determine.

The affidavit of merits and the amended affidavit of merits filed by the defendant in the cause do not set up any such defense. If it be true, as alleged by defendant, that she signed the note in question believing it to be a note for $500, it is strange that it did not occur to her or to her counsel to set up this defense in either the original or amended affidavit of merits. Clearly, when suit was brought it must have been evident to defendant, if her statement with reference to the circumstances under which she signed the note be true, that an effort was being made to collect from her on a note which she never intended to sign. This is not the defense, however, which she relied upon or attempted to make until the case was actually on trial. The original affidavit of merits charges that the note was without consideration; that plaintiff received it without consideration; that he took it to avoid a defense of fraud which might have been made to an action by Thomas; and that Thomas had represented to her at the time she signed the note that it would be deposited with the Robinson Springs Company solely for the purpose of holding it on deposit and that it would not be assigned. This is the defense she makes in her original affidavit of merits, and in the amended affidavit she does not set up that she

was induced to sign the note by fraud or trickery, but she asserts she did not execute the note at all and that she had not delivered it to the Robinson Springs Company. On the witness stand she stated that she did sign and endorse the note. There is no evidence in the record which tends to contradict the statement of plaintiff that he received the note four months before it became due and that he had paid a valuable consideration, $1,167, therefor.

The defendant, even if the averments in her original affidavit referred to be true, would not be permitted to make the defense that Thomas had transferred the note in violation of his agreement, to an action on the note by one who produced it for a valuable consideration, before maturity and without notice of this defense.

It is urged by counsel for the defendant that the averment in the amended affidavit of merits that the defendant had not executed or endorsed the note, is a sufficient allegation to permit the introduction of evidence tending to show that she had in fact signed and endorsed the note in question, but that she did so as the result of fraudulent conduct on the part of Thomas. We do not consider this contention well founded. In any event, in her testimony she states that she did in fact sign and endorse the note, but that she did so under the belief that it was a note for $500. The trial court would not permit her to describe the circumstances under which the note was signed and endorsed by her. The ruling of the court in this particular was correct. The fraud which she relied upon to vitiate the instrument was not set up by her in her affidavit of merits, and hence this defense could not be made

by her to the action brought by the plaintiff.

During the course of the trial the defendant asked leave to file a further affidavit of merits. This leave was denied by the court. We do not think this ruling of the court can under the circumstances be said to have been such abuse of judicial discretion as would warrant a reversal of the judgment.

The defendant also moved to vacate the judgment entered in the cause, and in support of such motion filed an affidavit. This affidavit in substance sets up that new facts had been discovered by counsel, who signed the affidavit, which if introduced upon another trial would tend to contradict the statement of the plaintiff that he had given two checks, some days apart, in payment for the note signed by the defendant, and that the latter one of these checks was given at a later date than the first for the reason that he, the plaintiff, did not have sufficient money on deposit in the bank to pay for the note at the time the first check was drawn and delivered. No sufficient reason was shown in the affidavit why this evidence was not procurable at the time of trial or at some time before final judgment was entered in the cause; but in any event we do not think this evidence, if offered at another trial, would have aided materially in determining plaintiff's right to recover.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

312 - 22746

WOLFE ADOLPHUS,
Appellee,
vs.
ANNA N. KENDALL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 316

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The action by the plaintiff in the Municipal Court was based upon two promissory notes, one dated June 1, 1914, for the sum of $1,000, the other dated June 27, 1914, for the sum of $500; both notes were signed by the defendant, Anna N. Kendall, and were made payable to her order and endorsed by her and delivered to one Henry H. Thomas. At the time of such delivery of the notes Thomas was president of the Robinson Springs Company, and the notes were executed by the defendant with the understanding that they were to be given to and used by that company. Thomas procured the endorsement of plaintiff on these two notes. The payment of the notes was refused by defendant when they became due; the plaintiff paid the same and then brought suit against the defendant for the amounts which he had been required to pay by reason of his said endorsements.

In an affidavit of merits filed by the defendant she set up as a defense to the action that the notes in question were given without consideration; that Thomas had delivered them to the plaintiff to avoid a defense of fraud; that Thomas, in violation of his promise, had transferred the notes without the authority of the defendant; and she also denied that she had executed the notes.

SOC.I.A. 318

The case was tried before a jury, and after hearing all the evidence the trial judge instructed the jury to find for the plaintiff. A verdict and judgment were rendered in favor of the plaintiff for the sum of $1,600; the defendant brings the case here by appeal for review.

It is insisted on behalf of the defendant that an examination of the notes in question will disclose that there had been a material alteration made in the same, and that this being so, the trial court erred in entering judgment in the absence of proofs, introduced on the part of the plaintiff, that such alterations were made at or before the time the notes were executed, or, if made subsequent to their execution, with the knowledge and consent of the defendant.

The alteration referred to is as to the date of one of the notes. This note bears date of "June 1st, 1914," and it is urged that the note itself shows evidence of some change having been made in the date. We have examined the note in question, which is incorporated in the record, and while there appears upon it some slight evidence that an alteration may have been made in the date, such evidence is not by any means sufficient to warrant a holding that the note had in fact been altered. A witness testifying for the defendant, when asked to give her opinion as to whether the date of the note had been changed, said: "I would consider this is the 'first' might have been changed." On cross-examination, however, she said: "I do not think that I could state positively that the 'first' was changed unless I had seen it done." This evi-

dence was not sufficient to support the charge that the note had been altered.

It is further insisted by the defendant that the court erred in refusing to allow the defendant to prove that the plaintiff had received money for his signature as endorser of the notes, and that he, the plaintiff, should not be permitted to recover an amount greater than he paid for the notes. We do not think the court erred in this particular. It is not denied that the plaintiff endorsed the notes or that he paid the same when they became due. This we think was all that it was necessary for him to prove in his action against the defendant, who was the maker of the notes in question.

The contention is made that the notes were given to Thomas without consideration and that they were used by him in violation of his agreement with the defendant. We are unable to see how the defendant can avail herself of this fact as a defense to an action brought by the plaintiff. The plaintiff endorsed the notes in question after they had been executed and endorsed by the defendant; there is no evidence in the record which tends to show that he had any knowledge whatsoever of the agreement, if there was such agreement, between the defendant and Thomas, and he is in no way responsible for the failure of Thomas to keep his agreement with the defendant. The defendant was primarily liable on these notes, and the record in this case does not furnish us with any reason for relieving her of such liability as against the plaintiff, who by his endorsement became secondarily liable for the payment thereof.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

317 - 22751.

205 I.A. 317

PETER J. VERHOEVEN, for use of CLARENCE VERHOEVEN, Assignee, Appellee,

vs.

J. OTTO INGERSOLL and ANNA INGERSOLL, Appellants.

Appeal from Circuit Court, Cook County.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court in favor of the complainant and against the defendants.

On June 6, 1915, the complainant filed a petition in the Circuit Court to enforce a sub-contractor's lien, under the Mechanics' Lien Act, against the defendants. The defendants were joint owners of premises located in Chicago. On October 1, 1913, they entered into a contract with Louis Beemsterboer, a contractor, for the erection of a building upon their premises. Under the terms of the contract the building was to be completed on December 1, 1913. The decree of the court found that the contractor entered into a verbal sub-contract with the complainant's assignor in October, 1913, to furnish material and work for the plumbing and sewer work to be done under the original contract, for a contract price of $785; that the last work under the sub-contract was done on the 11th or 12th day of November, 1914; that notice was served on January 2, 1914, by the sub-contractor, which notice complied in every respect with the Mechanics' Lien Act; that the complainant in all respects had complied with the statute regarding mechanics'

This is an appeal from a decree of the District
Court in favor of the complainant and against the
defendants.

On June 2, 1913, the complainant filed a petition
in the Florida Farm in relation a sub-contractor's lien,
under the Mechanics' Lien Act, against the defendants. The
defendants were later granted permission to file
an answer to the petition on January 12, 1914, and
on October 1, 1914, they entered into a contract with Lucia
Bonnaventure, a contractor, for the erection of a building
upon their premises. Under the terms of the contract the
building was to be completed on December 1, 1914. The
answer of the court found that the contractor entered into
a verbal sub-contract with the complainant, a carpenter in
October, 1914, by which contract the complainant was to do plumb-
ing and paper work in the same for the building contract,
which contract price it was; that the last ing was made the
sub-contract was given on the 11th or 12th of October,
1914; that within two months on January 5, 1915, if the
sub-contractor, whose price complied in every respect with
the contract, like so; that the complainant in all

[illegible]

liens; that the charges made for the work done by the sub-contractor were usual and reasonable; and the court decreed that the defendants pay the complainant the sum of $485.

The evidence heard on the trial tended to prove that the original contract was made on October 1, 1913, and that it provided for a completion of the work on or before December 1, 1913; that the sub-contract with complainant was entered into in October, 1913, and that no time was fixed in this contract for the completion of the work required under it. It was further shown that the building was not in fact completed until some time after the date fixed in the original contract. It does appear in the record that the complainant did, in the month of April and prior thereto, demand of the defendants the balance due him on his contract with Beemsterboer. The defendants refused to pay on these demands, and suit was begun in the Municipal Court on April 25th, 1914. At this time the defendants and their counsel insisted that nothing was legally due at that time to complainant, for the reason that the sub-contractor and the original contractor had failed to perform the work required to be done under the terms of the original contract. It was then urged by the defendants that the contract required the putting in of a certain down-spout on the building, and its connection with a catch-basin in the yard of defendants' premises.

The evidence further tends to prove that as a result of this contention on the part of the defendants, complainant's assignor, who has since died and who prior

to his death had assigned his claim and right to lien to complainant, completed the work on the building which defendants had asserted was incomplete.

It is insisted that the trial court erred in entering the decree in the suit, for the reason that Beemsterboar, the original contractor, should have been made a party to the proceedings to enforce the sub-contractor's lien. This complaint is made, for the first time, in this court in the brief filed by counsel for the defendants; it was not urged as error in the court below. Beemsterboar was made a party defendant in the petition filed by complainant and in the summons issued thereon. It does not appear, however, that said summons was served upon him. In an appearance filed in the case John B. Fruechtl appears as attorney for "some of the defendants." It is not shown by this appearance what defendants Fruechtl actually appeared in the suit for, although later in the proceedings he filed an answer on behalf of the defendants here. We think that the objection, made as it is for the first time in this court, comes too late; that it should have been presented to the trial court, which court could in its discretion have permitted the complainant to correct the error. Pease v. Chicago Crayon Co., 235 Ill. 391.

There was sufficient evidence heard upon the trial to establish the contract between the sub-contractor and the contractor, and that the price agreed upon for the furnishing of materials and the doing of the work required of the sub-contractor was fixed in the contract at the sum of $785. No allowance was made in the decree for extras claimed

by complainant.

It is urged that the complainant should have shown that money was due the contractor from the defendants at the time the lien notice of January 2nd was served. We do not agree with this contention. Defendants were bound by the law with notice of the existence, under the law, of the fact that sub-contractors would, within the specified legal time, have the right to enforce payment of their contracts with the contractor from the defendants and out of the premises in question.

It is urged that the complainant is not entitled to his lien for the reason that the work required of him under his contract was in fact all performed on or prior to January 31, 1914. The evidence discloses that in April, 1914, and prior thereto the defendants insisted that this work had not been performed at that time, and it appears that a suit pending in the Municipal Court was dismissed because of the position thus taken by the defendants; that thereafter, and because of the demands of the defendants, the sub-contractor in November completed the work, which had been the cause of much controversy between the parties.

It was orally stipulated at the trial that there were but two questions of fact in controversy between the parties; the first was as to the value of the work performed under the sub-contract, and the second was as to the time when this work had been completed. The trial court did not err in holding that the work required of the sub-contractor under his contract was completed in November, 1914, and that the petition herein was filed in apt time.

It is also urged that the record contains no proof

by complainant.

It is urged that the complainant should have shown that money was the exclusive type the motorists of the Zion motive of honesty and service. To do its share with this contention. Inducements were based by the law with motive of its existence, under this law, if the fact that sub-contractors would, within the specified time, have the right to enforce payment of their accounts with the contractor from the retained and not of the produced in question.

It is urged that the complainant is not entitled to his lien for the reason that the work required of him under his agreement was in fact not performed so as prior to January 31, 1918. The evidence discloses that in April, 1918, and prior thereto the interested learned that this work had not been performed at that time, and it appears that a suit pending in the municipal court was dismissed because of the petition then filed by the defendants, that thereafter, but before it had become the sub-contractor in December completed the work, which had been the cause of such dismissal before the petition.

It was decided affirmed of the said that there were but two questions to be considered, namely, the first one as to the value of the work performed under the sub-contract, and the second one as to the time when the work was completed. The first under all the evidence in making that the said value of the sub-contract under its contract was completed in December, 1918, and that the petition herein was filed in due time.

It is also urged that the record contains no proof

that there was money due the contractor by the defendants at the time the petition was filed. While the written contract provided for the completion of the work on December 1, 1913, there is ample evidence in the record tending to show that the defendants waived their right to insist upon this provision of the contract. The work was not in fact performed for some time after this date, and for several months thereafter the defendants insisted and asserted that the contract had not been completed. We think it fairly inferable from the evidence that the defendants did not pay the sum due under the contract before the work required by it was in fact completed.

Other questions are presented, as to which we think no error was committed by the trial court.

The decree of the Circuit Court is affirmed.

AFFIRMED.

320 - 22754

WM. N. DEE CO., a corporation,
Appellant,
vs.
JACOB J. HUBBARD,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 319

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff in the Municipal Court against the defendant to recover the sum of $424. Judgment was entered in favor of the defendant, and plaintiff brings the case here by appeal for review.

It appears from the evidence in the record that one Losey had invented a machine, which is described as a dynamometer. Losey called on the defendant with the plans for his machine, and defendant agreed with him to pay $1,000 for an interest in a company which was to be organized to exploit the machine, provided patents for it were procured. The patents were never granted. In September, 1914, the defendant paid William Elsner, a pattern maker, the sum of $263 for a set of patterns to be used in the construction of the dynamometer. In October, 1914, Elsner employed the plaintiff company to construct the machine for an agreed price for material and labor. Elsner and Edgar Smith, superintendent for plaintiff, both testified that Elsner stated that the machine was to be built for the defendant. It is not denied that the plaintiff performed the services and furnished the materials required under the contract, and that it is fairly entitled to be paid the sum of $424 therefor.

When the machine was about completed by plain-

220 - 24/28

Abstract.

Patterson,

tiff, the defendant and Elsner visited the foundry of plaintiff and examined the machine in the presence of an employe of the plaintiff. This employe testified, from a memorandum, that this visit to the foundry was made on November 20th. Hubbard, the defendant, and Elsner stated that it was made on the 30th day of November, or a few days before that date. Defendant says that he directed Elsner to go ahead and finish up the machine and to test it. Osman, plaintiff's employe, says that this remark was directed to him. At all events the machine was finished in accordance with the terms of the contract, and the only question this court is called upon to determine is whether Elsner was authorized to act for the defendant in the matter, or whether the defendant can be said by his acts and conduct to have ratified the contract which Elsner had made with the plaintiff.

There does not seem to be much material controversy between the parties as to the essential facts of the case. There is some dispute as to whether the defendant directed the remark referred to to plaintiff's employe or to Elsner. We are inclined to the opinion that on the whole record the defendant must be held to have authorized the contract in question. There is no dispute in the evidence that Elsner did in fact attempt to enter into a contract for and on behalf of the defendant. It is also shown that the defendant had, by his arrangement with Losey, a material interest in the subject-matter of this contract. He had agreed to invest $1,000 in the business of a company which was to be organized after a completion and test of the machine; he furnished $263 to Elsner for the patterns necessary in the production of the machine, and he admits

paying $15 by check to Elsner on the 30th day of November, 1914, for certain valves that were needed in the completion of the machine. He says that he had no knowledge that the machine was being built until November 30th, the day on which he gave his check to Elsner; yet on cross-examination he fixed the time of his visit to plaintiff's foundry by reference to the date of this check, and said he visited the foundry two or three days before the check was drawn; he admitted it was possible that this visit occurred on November 21st.

The judgment should have been in favor of the plaintiff? The defendant knew that the machine was being constructed by plaintiff some days before the time when, he said, he had his first information that the machine was being built; he knew as early as September, 1914, when he paid $263 for the patterns, that the machine was to be constructed, and we think when all of the testimony of the witnesses is considered, that there can be but small doubt of the liability of defendant for the amount due plaintiff. The material was furnished and the labor performed at the request of Elsner, who at the time the contract was executed assumed to have authority to act for defendant. The contract was in fact, to some extent, for defendant's benefit, and he, by his acts, must be held to have ratified the action of Elsner, whether he did or did not directly authorize them.

The judgment of the Municipal Court will be reversed and judgment will be entered here in favor of the plaintiff for the sum of $424.

REVERSED AND JUDGMENT HERE.

323 - 22757

HARRY B. LUSCH,
Appellant,

vs.

CHARLES J. RITTENHOUSE and WALTER RITTENHOUSE, Executors of the estate of Moses F. Rittenhouse, deceased,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 320

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Action was brought in the Municipal Court by the plaintiff against the defendants to recover upon the letter following:

"Chicago, Apr. 22, 1913.

Mr. Harry B. Lusch,
819 New York Life Bldg., City.

Dear Sir:

In consideration of your filing suggestion of damages in the Superior Court of Cook County, Illinois, in the case of Jerome G. Leavitt v. Harry B. Lusch et al., General Number 296324, by reason of the issuing and subsequent dissolution of the injunction in said cause, instead of commencing an action upon the injunction bond filed in said cause wherein Jerome G. Leavitt is principal and I, Moses F. Rittenhouse, am surety, I hereby agree upon final determination of said suggestion of damages by said Superior Court, or upon final determination of any appeal that may be taken from any award that may be rendered in your favor by said Superior Court to pay you the amount of said award upon the final determination of the same, not exceeding, however, the sum of $5,000.00.

Yours truly,
MOSES F. RITTENHOUSE."

Following the execution of this letter the signer, Moses F. Rittenhouse, died, and the executors of his estate have been made parties defendant. The letter referred to was introduced in evidence upon the trial, and it was agreed between the parties that following the execution of the letter the plaintiff filed a suggestion of damages in the Superior Court, which court, after hearing before

2051.1.320

the master, entered a decree thereon in favor of the plaintiff; that after the entry of such decree, Leavitt, the principal in the bond, brought the case by writ of error to the Appellate Court, which court reversed the decree of the Superior Court without remanding the cause; that the plaintiff thereafter filed a petition for a writ of certiorari in the Supreme Court, which petition was denied, and following this the mandate of the Appellate Court reversing the decree of the Superior Court was filed in the Superior Court.

It was further agreed between the parties that the bill of complaint filed by Leavitt, in which the injunction bond referred to in the above letter was given, was dismissed December 27, 1912; that the decree of the Superior Court assessing plaintiff's damages was entered January 22, 1914, and that the writ of error referred to was sued out at the next term of the Appellate Court, which was the October term, 1914, and that there was no delay in suing out such writ of error.

It is agreed, then, by the parties that the reversal of the judgment of the Superior Court in favor of plaintiff on his suggestion of damages, was brought about by writ of error proceedings and not as the result of an appeal to the Appellate Court, and it is gathered from the briefs of plaintiff that he would not be entitled to recover in this suit against the defendants if Leavitt, the principal in the bond, had procured a reversal of the judgment of the Superior Court on an appeal instead of by the issuance out of the Appellate Court of a writ of error.

The only question which this court is called upon to determine is whether the word "appeal" as used in the letter should be given its strict, technical meaning, as insisted upon by counsel for the plaintiff, or whether

it should be held that Rittenhouse, who executed the letter, used such word in its broader and more popular sense, as indicating any legal means by which a court of review is given power and opportunity to review a judgment or decree of a lower court.

It is insisted by plaintiff that even though it be conceded that from the date of the entry of the judgment of the Appellate Court the decree of the Superior Court had no further force or effect, that nevertheless such decree of the trial court remained of record as a memorial of the determination of the trial court of the matters in controversy in the suggestion of damages proceeding.

We are inclined to the view that plaintiff's construction of the letter is too technical and narrow. The word "appeal," as used in the letter, should not be given a meaning so restricted as to give to the whole letter a meaning in no sense expressive of the real intention of the parties. When Rittenhouse signed the letter in question it was his purpose to avoid the expense and annoyance that would have followed had he been made a party to a suit on the injunction bond; he agreed to be bound, within limits, by a final adjudication of the suggestion of damages suit, and his intention to limit his liability and to avoid litigation is easily gathered from the language he employed in his letter.

The decree of the Superior Court in favor of plaintiff has been reversed by the Appellate Court, and, so far as this record shows, Leavitt, the principal in the injunction bond, is not liable to the plaintiff in any sum upon the bond. If there has been a final determination of the question of liability on such bond, it is that neither Leavitt nor his surety, Rittenhouse, is so liable; it is

apparent that Rittenhouse signed the letter with the intention of responding to plaintiff in the event that Leavitt's liability should be established by the entry of a final judgment in plaintiff's favor; and as the record discloses that there is at this time no such judgment of record, it follows as a matter of course that plaintiff cannot recover in this action.

Under the circumstances existing at the time the letter was signed, and when consideration is given to the language of the whole letter and the intent of the parties as plainly evident therein, we are disinclined to give to the word "appeal" as used in the letter, a construction so technical and restricted as to defeat the evident purpose of the parties when the contract under consideration was entered into.

In City of Rockford v. Compton, 115 Ill. App. 406, it was held that "the term 'appeal,' in its original, technical and appropriate sense, meant the removal of a suit from an inferior court, after final judgment therein, to a superior court," etc., and the court in its decision approved the language of the Supreme Court of the United States in United States v. Goodwin, 7 Cranch 108, following:

> "'An appeal is a civil process, and removes a cause entirely, subjecting the law and fact to a review and a retrial.' While this is the technical definition, it has not always been observed in modern times; but the term 'appeal' is often used as embracing all kinds of proceedings for the review of cases."

"Appeal - Law - To make an appeal; to apply for the removal of a cause from an inferior to a superior judge or court for the purpose of re-examination or for decision." Webster's New Dictionary.

The law writers have frequently used the word "appeal" in its less restricted and technical meaning. "(2) To remove a cause to a higher court for review and

retrial; also, the proceeding in itself considered." Anderson's Law Dictionary. "In Practice: The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial." Bouvier's Law Dictionary; Prairie County v. Matthews; 48 Ark. 353; Taylor v. Gray, 44 Atl. Rep. 668.

We are of the opinion that the terms of the written instrument in question are to be understood in their plain, ordinary and proper sense, and that they were not employed by the deceased to indicate an "appeal," as the meaning of that word is technically understood in the practice of removing causes from trial courts to courts of review. Greenleaf on Evidence, vol. 1, sec. 278. In its essence the contract between the parties provided for a final and enforcible award against Leavitt, the principal in the injunction bond, before the surety, or his executors, could be made to perform his contract with the plaintiff. Appeal of Lang, 134 Pa. 641.

The reversal of the decree of the Superior Court by the Appellate Court without remanding the cause for further proceedings was a final adjudication of the right of the plaintiff to recover against Leavitt in that suit, and if our construction of the letter in question be correct, then the judgment of the Municipal Court should be affirmed.

AFFIRMED.

205/321

358 - 22772

Filed April 16, 1917

ARTHUR HENRICKS,
Appellee,
vs.
FRANK HARMAN,
Appellant.

Circuit Court, Clinton County, Illinois.

205 I.A. 321

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court in favor of the plaintiff and against the defendant, Frank Harman, for the sum of $1,000. Suit was originally begun against two defendants, Harman and John J. McKill, but McKill was later dismissed out of the case.

The amended declaration consists of two counts, the first of which alleges in substance that on the first day of June, 1912, the defendant, Harman, was the owner and in possession of and using an automobile; that John J. McKill, with the consent and knowledge of the defendant and in his presence, operated said automobile so negligently and carelessly, while the plaintiff was in the exercise of due care, that it struck the plaintiff with great force and injured him. The second count of the declaration is substantially the same as the first except that it charges that McKill "was then and there using and operating said automobile on behalf of, under the direction of and for said" defendant.

The evidence heard upon the trial tends to prove that the defendant, the owner of the automobile, drove it on the day of the accident [illegible] premises; that a short time thereafter the [illegible] driven and loaded out of the yard by John J. McKill as it appeared the evening previous and that the [illegible]

trance to defendant's premises it was brought into the wagon upon which the plaintiff was sitting, and that plaintiff thereby sustained certain injuries.

There was a direct and sharp conflict in the evidence as to whether the defendant at the time in question was standing upon the running-board of the automobile and giving directions to Lovell, and as to whether Lovell was then and there operating the automobile for, or in connection with the business of, the defendant. It would serve no useful purpose to set out the evidence pitting in these controverted questions, and it is sufficient to say that evidence was submitted to the court and jury tending to prove the respective theories of the parties upon this branch of the case.

Much complaint is made by the defendant of the giving, refusing to give, and the modification by the court of certain instructions. As stated, the evidence was in sharp conflict with reference to the most important questions of fact involved in the trial, and, this being so, it was obligatory upon the court to correctly instruct the jury as to the law applicable to the case.

At the close of all the evidence the defendant requested the court to give to the jury the following instructions:

"The court instructs the jury that if you
find that the defendant, Corbish, [illegible]
and may have been present at the time [illegible]
Lill started to drive his automobile out of the
of the defendant Corbish, is not sufficient to
to make the defendant, Corbish, liable for any
sustained by the plaintiff, and before [illegible]
recover against the defendant, Corbish, [illegible]
must not only find that the automobile [illegible]
longed to the defendant, Corbish, but must also
[illegible] driven by Lovell for
[illegible] and if the jury find from the evidence that
plaintiff has failed to prove [illegible]
[illegible] at the time of the accident
[illegible], the jury should find the

"The court instructs the jury that if the jury believe from the evidence that ... consented to use ... automobile ... in taking the ... said Ingalls was going ... own use and that ... was injured while ... driven by Ingalls, ... fendant not guilty."

The court refused to give these instructions as tendered; it modified the first by inserting after the word "business" in the fifth line from the end, the following clause, "or by and with the consent of ...." The same insertion was made in the instruction after the word "business" in the last line of the instruction. The second instruction above quoted was modified by the court by striking out the word "not" before the word "guilty" appearing in the last line of the instruction. Those instructions as so modified by the court were given to the jury.

We think the court erred in modifying these two instructions as it did. We are inclined to the view that both instructions as tendered by the defendant correctly stated the law as applicable to the issues of the case which they were intended to cover. The first of these instructions as modified by the court informed the jury that the defendant was legally liable to the plaintiff for any injuries which he might have sustained, if the jury found from the evidence that Ingalls drove the automobile "by and with the consent of ...." This is clearly not the law. It is not material in the declaration, nor is there any evidence in the record which tends to show, that Ingalls was employed to operate the automobile as ... This instruction authorized the jury to find the defendant guilty irrespective of what the jury might find as to

whether McGill was or was not using or driving the automobile in and about the business of the defendant.

So, also, with reference to the second instruction above quoted. This instruction as modified by the court, in effect directed the jury to find the defendant guilty if the jury believed from the evidence that the defendant had permitted McGill to use the automobile for his, McGill's, "own purposes and his own use." This instruction as tendered should have been given, as it correctly stated the law applicable to the issue of fact presented by the pleadings and the evidence with reference to this branch of the case. By the omission of the word "not" from the instruction the court informed the jury that the defendant was liable to the plaintiff for any act of negligence on the part of McGill, even though the jury should find from the evidence that McGill was driving the automobile solely for his own use or purposes. This is not the law. The owner of a vehicle, in cases similar to the one at bar, is only liable where it is shown by a preponderance of the evidence that the person operating such vehicle is, in some degree, acting for such owner or that he is operating the vehicle in and about the owner's business.

Complaint is also made as to other errors occurring during the course of the trial, as to which we express no opinion. From what has been said it is obvious that the case must be retried, and these questions will not be presented on another trial.

The judgment of the circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

304 - 22738

A. DELBERT DEWEY,
Appellee,

vs.

J. C. K. LINDHOUT, individually and as trustee,
Appellant.

APPEAL FROM CITY COURT OF CHICAGO HEIGHTS.

205 I.A. 322

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree against defendant, J. C. K. Lindhout, ordering him to pay $182.03 costs of the suit within thirty days from the entry of the decree, and that upon failure so to do execution issue therefor. The injunction theretofore issued restraining Lindhout from disposing of the sum of $700 was made permanent.

Complainant's wife divorced him, and in a settlement of his obligation of support of his wife and children an agreement in the nature of an alimony agreement was entered into. This agreement is dated October 28, 1915, and is directed to Mrs. Lena Dewey, the wife, and signed by A. Delbert Dewey, the husband. The first agreement, made to settle property and alimony matters for $400, was changed; by it A. Delbert Dewey agreed that he would deliver a warranty deed and a bill of sale to all of his interest in his property, real or personal, in consideration of the payment of $700, and it provides - "Since our debts amount to in the neighborhood of $500.00, it is further agreed by me that I shall pay all of the debts due and owing by either or both of us out of said money, said debts having been contracted before June 1, 1915." It was agreed that the debt should be paid under the supervision of Mrs. Dewey's counsel. The $700

was deposited in the Illinois State Bank of Crete by defendant Lindhout in his name as trustee. Complainant gave notice to the bank that the money deposited by Lindhout as trustee was wrongfully and illegally so deposited; that the money belonged to him, notified the bank not to recognize any check, order or draft upon the $700, and threatened in the event the notice was disregarded to hold the bank responsible for any loss or damage Dewey might suffer.

It seems that Lindhout purchased a number of claims against Dewey for fifty cents on the dollar. The original agreement, it will be observed, provided that the debts should be paid under the supervision of Mrs. Dewey's counsel, and Lindhout was her counsel.

The evidence is voluminous, and it is our opinion that no good purpose can be subserved by reciting it. The whole controversy involves the bona fides of the action of defendant Lindhout in the matter of the agreement as to the $700. If Lindhout was guilty of the fraud charged, then the decree is right; if he was not, then it is manifestly erroneous.

The decree finds that Lindhout was wrongfully in possession of the money. This is contrary to the probative force of the evidence. The money came to him under the agreement and with the knowledge of all the parties, and so far as the evidence shows, he cared for it in an ethical way and was diligent in paying out as little of it as was necessary to the extinguishment of Dewey's debts.

A scanning of the record fails to disclose any fraudulent or improper acts upon the part of Lindhout either with the money or in his dealings with complainant or Mrs. Dewey. On the contrary, we are impressed with the fact that Lindhout acted with diligence, discretion, and fidelity

to the interests of his client and for the protection as far as possible of her rights; that nothing that he has done in any way or manner affected prejudicially the financial interests of complainant. The state of the account shows that there is no money which came to the hands of Lindhout and for which he is responsible as custodian, which is either due to or which can become due to complainant. While Lindhout had no express authority to deposit the money in the Crete bank in his own name as trustee, we think that authority may be reasonably inferred from his relationship to the parties and the fund, and that it was a matter resting in his discretion to deposit the money in the bank in his name as trustee. The money was not his, and the law impressed a trust upon the money in virtue of the agreement, and by the acts of the parties and the express provisions of the agreement, Lindhout was, when he received the money, the trustee thereof.

We are unable to see that complainant has been injured by any action of Lindhout or that complainant has any standing in a court of equity as against defendant Lindhout.

The decree is not supported by the proofs in the record.

The decree of the City Court of Chicago Heights in Cook County is reversed and the cause remanded, with directions to that court to dissolve the injunction against Lindhout and to dismiss the bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

318 - 22752

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. MICHELANGELO PACELLA,

Appellant,

vs.

BENNETT MEDICAL COLLEGE, a corporation,

Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

205 I.A. 324

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding in which the petitioner, who comes before us in propria persona, seeks a mandamus commanding the respondent to forthwith issue and deliver to him a diploma of graduation as a doctor in medicine, duly executed by its officers.

The cause was heard on petition, answer and replication, and the court dismissed the petition at petitioner's cost. The petitioner has assigned thirty-one errors upon the record, to which, in this opinion, we shall pay but little attention, contenting ourselves with a short recital of the contractual relationship of the parties and their rights under the law.

Petitioner was a student of medicine in the so-called medical college of respondent. He avers that respondent is engaged in tutoring medical students and bestowing upon them the degree of doctor of medicine when they shall have complied with certain rules and regulations advertised by the college, and that he followed and observed the advertised requirements.

It appears that at the annual commencement exercises held June 1, 1915, for the conferring of degrees, etc., petitioner assembled with his fellow students,

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uniformed with the regulation cap and gown; that his name appeared in the printed list of students to be graduated; that the students assembled were each presented with a diploma; that to all outward appearances petitioner received a diploma which he thought was conferring upon him the degree of Doctor of Medicine; that upon examination the so-called diploma turned out to be one in blank, conferring neither degree nor title of any kind; that respondent, though requested to deliver to petitioner a diploma conferring upon him the degree of Doctor of Medicine, has refused; that lacking such diploma petitioner cannot present himself to the Illinois State Medical Board for examination for a license to practice medicine.

A demurrer to the petition was overruled and respondent answered, in which it set up that requirements for graduation and the conferring of a diploma were not, as set forth in the petition, "satisfactory examination in all branches and attendance upon clinics with a rating of not less than 80 per cent average," but "satisfactory examination in all branches."

The answer further set up that petitioner had been reported in obstetrics and gynecology of grade E, in the first semester, and of D in the second semester; in ophthalmology of grade E in the second semester; in physiological therapeutics of grade E in the first semester; denied that appellant had paid the graduation fee as well as the tuition fee; admitted that he paid $1.50 for cap and gown uniform; that his name appeared in the printed list of students to be graduated; that he was present on the stage and was handed a tube or package similar to those handed other students then and there appearing on the stage.

In respondent's rules, D means repeat examination only, and E means repeat entire course, class work and examinations.

Without reciting the evidence, suffice it to say that the contentions in respondent's answer were fairly sustained, and it affirmatively appeared and was not and could not be successfully contradicted, that petitioner did not pass "satisfactory examination in all branches." With the record of petitioner's lack of attainments in medical science before us, it would be anomalous for a court of law to arrogate to itself the right, duty or responsibility of determining that petitioner had complied with the regulation of passing a satisfactory examination in all branches of his studies. The courts are not supposed to be learned in medical science and are therefore not qualified to pass an opinion as to the attainments of a student in medical science. We are bound by the record, and that record abundantly proves that petitioner was sadly deficient in his examinations and did not attain the standard requisite to justify the respondent in granting him a degree of Doctor of Medicine, under its rules, which bound the college and petitioner as well. Petitioner subsequently attended a summer course of two months, but still respondent failed and refused to grant the coveted diploma. A medical school must be the judge of the qualification of its students to be granted the degree of Doctor of Medicine. The prerequisite of the possession of such a degree by the applicant in order to entitle him to examination before the State Medical Board for a license to practice medicine, is a wise and salutary provision of the law and a source of protection to the

public.

The presenting to petitioner of a sham diploma was simply to spare his feelings and prevent his humiliation before his fellow students and the audience assembled to witness the conferring of degrees. This, we understand, is the usual course of procedure where a student fails to qualify for a diploma. No inference contrary to the facts in the record can be indulged because of the apparent presentment of a diploma; in other words, we cannot say, because the form of presentation of a diploma was gone through with that therefore the petitioner is inferentially entitled to receive a genuine document.

The legal propositions argued by petitioner lend no light to the solution of the problems here presented. Petitioner has failed to cite any decision in point by any court, either on principle or fact. Respondent has not appeared in this court.

The judgment of the Circuit Court denying the prayer of petitioner for a writ of mandamus against respondent is affirmed.

AFFIRMED.

328 - 22762

ISIDOR COHN and HERMAN COHN, trading as COHN BROTHERS CIGAR COMPANY,
Appellees,

vs.

S. BERNSTEIN and A. SWIDLER,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 325

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In the trial court there was a finding and judgment for $500 in favor of plaintiffs in this cause, and defendants appeal.

The action was upon a written guaranty from defendants to plaintiffs guaranteeing credit of Charles Piantry to the extent of $500.

The defense mainly rests in a denial of defendants of the execution by them of the contract of guaranty. We think the court might fairly find from the evidence that the writing in suit was executed by defendant as surety for Piantry to the amount in that writing limited. The questions in dispute involved the veracity of the several witnesses testifying, and while the testimony is conflicting we are not disposed to disturb the finding of the trial Judge, who saw the witnesses and from such observation was much better able to determine their credibility than are we, who are deprived of such advantages. The plaintiffs established by their proofs the execution by defendants of the undertaking in suit, and we are not able to say that such proofs were overcome by the case made by defendants.

The judgment in this case was entered February 17, 1916. On March 9, 1916, defendants made and filed a

written motion that the finding and judgment be set aside and a new trial granted. This motion was denied two days thereafter. Thereupon defendants prayed an appeal, which was allowed in bond of $750. The appeal bond found in the record recites that the appeal is prosecuted from the judgment entered February 17, 1916.

In this situation defendants had the right of two appeals - one from the judgment and the other from the order denying the motion to set aside the finding and judgment and grant a new trial - as motions for a new trial and in arrest of judgment had been made and denied prior to the entry of the judgment recited in the appeal bond. The judgment order and the order denying the motion to set aside the finding and judgment subsequently made, were both final appealable orders. The latter order, therefore, is not before us for review. Our review is confined to the record preceding and including the judgment order recited in the appeal bond. This precise question was passed upon adversely to defendants' contention in Gebhard v. Brewers Malting Co., 185 Ill. App. 254.

The rulings of the court on the propositions of law tendered did not prejudicially affect the rights of defendants, as the finding of the court on the facts fixes the liability of defendants under the law applicable thereto.

There is no reversible error in the record reviewable on this appeal, and the judgment of the Municipal Court is accordingly affirmed.

AFFIRMED.

331 - 22765

SARAH L. MEAD,
Appellee,

vs.

GEORGE H. MEAD,
CHICAGO & NORTHWESTERN
RAILWAY COMPANY, a cor-
poration, impleaded,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

205 I.A. 327

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainant sued her husband, George H. Mead, for divorce for drunkenness and obtained service on him by publication. This was all the service ever had upon him, and he appeared neither in person nor by counsel in any proceeding in the divorce suit nor in any proceeding against the Chicago & Northwestern Railway Company. On November 6, 1914, complainant was awarded a decree of divorce on the service by publication. In that decree the court retained jurisdiction for the purpose of fixing permanent alimony "should personal service on the defendant be secured later."

On July 7, 1913, complainant's husband had judgment in the Circuit Court of Cook County against the Chicago and Northwestern Railway Company for $4600.84. May 23, 1914, Mead assigned this judgment to Edward R. Sanford, Jr., who on February 1, 1915, reassigned the judgment to Charles L. Hayes. Both assignments were on February 6, 1915, filed in the office of the clerk of the court in which Mead's judgment was entered.

On December 31, 1914, complainant filed a petition in her divorce action against the Chicago & Northwestern Railway Company, alleging that it was indebted to her di-

2052 I/A. 327

vorced husband in the sum of $7,000, and claiming she was entitled to be paid permanent alimony and solicitor's fees out of said fund. She prayed for and obtained, without notice, an injunction against the Railway company, enjoining it from paying any sum to her late husband or to anyone in his behalf and also restraining him from receiving any sum from the Railway company. This injunction was served upon the Railway company, but was never served upon George H. Mead or either of his assignees.

On February 8, 1915, Hayes, as assignee of Mead's judgment against the Railway company, commenced an action in the District Court of Ramsey County, Minnesota, seeking a judgment in that court against the Railway company for the amount due on the Cook County judgment above recited. On March 9, 1915, complainant, on her own initiative, was allowed to intervene in the Ramsey County suit. She alleged in her intervening complaint that the assignments from Mead to Sanford and from Sanford to Hayes were fraudulent, collusive, and without consideration, and were for that reason void and of no effect. She also set up in her intervening pleading her claim, conforming to the course of procedure in Minnesota, alleging that she had such an interest in the matter in litigation of Hayes against the Railway company that she would gain or lose by judgment rendered therein, according to the effect of such judgment; also setting forth the proceedings had in her divorce suit not only against her husband but also against the Railway company, and attached to her pleading a copy of the injunctional order. Hayes joined issue on the answers of the Railway company and of complainant, the intervenor.

On March 18, 1915, complainant's divorced hus-

band died. On April 5, 1915, complainant filed a supplemental complaint in the Hayes suit, in which she set up the death of her former husband, that he died intestate, leaving her his widow, and that as such she claimed all of his personal property, including the judgment which Hayes was seeking to enforce against the Railway company. She also set forth a section of the Illinois statute, which reads:

> "If any husband or wife is divorced for the fault or misconduct of the other, except where the marriage is void from the beginning, he or she shall not thereby lose dower, nor the benefit of any jointure, but if such divorce shall be his or her fault, or misconduct, such dower or jointure, and any estates granted by the laws of this state, in the real or personal estate of the other, shall be forfeited."

On June 24, 1915, the issues joined in the Hayes case against the Railway company, in which complainant had intervened, were tried and a verdict rendered in favor of Hayes and against the Railway company for $3466.41, there being a credit on the Circuit Court judgment of $1500 paid to complainant's husband's attorney by the Railway company under a modification of the injunction against it, and on July 10th a judgment for $3484.11 was entered in favor of Hayes.

Complainant failing to prosecute her intervening proceeding, it was dismissed for want of prosecution. An application made by complainant to vacate that order was after a full hearing denied. Hayes also recovered a judgment for costs against complainant in the Ramsey County court suit.

James F. Bishop, Public Administrator of Cook County, had been appointed by the Probate Court administrator of the estate of complainant's husband, and as such was substituted as defendant in the divorce suit, and on July 20, 1915, complainant secured in her divorce suit as thus amended,

without notice to the Railway company, an order against Bishop as administrator decreeing her $2,000 alimony and $500 solicitor's fees, which order recited that the award of alimony and solicitor's fees was a lien upon the judgment obtained by her deceased husband against the Railway company.

On August 6, 1915, complainant commenced an action in the District Court of Ramsey County, Minnesota, against Edward R. Sanford, Jr., the original assignee of her husband's judgment, individually and as administrator of her deceased husband's estate, Charles L. Hayes and John Wagner, Sheriff of Ramsey County. In this suit complainant asked for an allowance of $2500 and solicitor's fees and for an order restraining appellant from paying the judgment obtained in the Hayes case, and Wagner, as Sheriff, from collecting the judgment, and Hayes and Sanford from receiving the amount of the Hayes judgment against the Railway company. On the same day a temporary restraining order was issued, which, upon a hearing August 17, 1915, was vacated and the motion for an injunction denied.

After the dissolving of the restraining order and the denial of complainant's motion for an injunction, the Sheriff of Winona County, Minnesota, under final process issued on the Hayes judgment against the Railway company, levied upon certain of its property and sold it for the amount of the judgment and costs and satisfied the judgment.

After the judgment in the Hayes case complainant filed a supplemental petition in her divorce suit proceeding and sought an injunction against all the parties from either paying or receiving the amount due on the Hayes judgment against the Railway company, etc. The order prayed

for was allowed and thereafter a supplemental petition was filed revamping substantially the steps that theretofore had been taken, and among other things asking that an order be entered that the Railway company deposit with the clerk of the court $2500, the amount allowed for alimony and solicitor's fees, to await the final determination of the court of the rights of the parties. This petition asked for an order on the Railway company and Sanford and Hayes to answer. On July 26, 1915, the Railway company was enjoined from paying the Hayes judgment to him or anyone else for him and from satisfying the judgment. No injunction writ was, however, issued on this order.

On July 29, 1915, the Railway company moved to dissolve the injunction granted July 26, 1915, and filed its affidavit in support of said motion, reciting fully all the facts relating to the several suits above mentioned in which complainant was a party. An answer was also filed setting up these facts. On January 27, 1916, complainant filed what she termed an amended and supplemental petition, in which all of the matters involved were again gone over. On these various petitions, supplemental petitions as amended, etc., and the answer of the Railway Company thereto, there was a hearing. On this hearing it was proven without contradiction that the Hayes judgment had been paid by the Railway company. The evidence heard by the chancellor embraced all of the court proceedings had, including the proceedings terminating in the judgment of complainant's husband against the Railway company. On July 24, 1916, the decree before us for review was entered, which, among other things, set aside the assignments of the judgment of said Mead against the Railway company, holding they were fraudu-

lent and void and ordering the Railway company to pay complainant $2500 within ten days and in default that execution issue therefor.

We think that the decision of this cause requires the determination by us of but two questions:

First: Did the Circuit court have jurisdiction to proceed to award alimony after the decree of divorce granted complainant? Second: Did the proceedings and judgment in the District court of the County of Ramsey, Minnesota, bind the parties?

The Circuit court never had jurisdiction of the person of complainant's husband, and the attempt to reach out and grasp the money due from the Railway company on the judgment against it and in favor of the husband did not operate to give the court such jurisdiction. When complainant's husband died the court was without jurisdiction to further proceed to allow alimony to complainant in her divorce suit. The very terms of the divorce decree limited procedure to award alimony to the time when personal service was had upon the husband. Lacking personal service or appearance by him, the court was without jurisdiction to enter a decree for alimony even though he had property within the jurisdiction of the court. Proctor v. Proctor, 215 Ill. 275. Without service or appearance, no money decree in personam could be entered. Cloyd v. Trotter, 118 Ill. 391. Neither could the court enter a judgment for costs. Pennoyer v. Neff, 95 U. S. 727. Upon the death of complainant's husband her right to alimony ceased. In Lennahan v. O'Keefe, 107 Ill. 620, the court said:

> "By the English law, alimony was but an allowance during the joint lives of the husband and wife, or so long as they should live separately. (Wallingford v. Wallingford, 6 Harris & Johnson, 438; Lockridge v. Lockridge, 3 Dana, 28; Clark v. Clark, 6 Watts & S. 85;

> 1 Blackstone's Com. 441.) And, notwithstanding alimony in this country is, generally, the allowance made to the wife out of the husband's estate after a decree of divorce a vinculo matrimonii, and is, by statute, in many respects modified from what it was in case of divorce a mensa et thoro, in England, we know of no case in which it has been held to be a debt continuing after the death of the husband against the heir, but directly contrary was held in O'Hagan v. Executors of O'Hagan, 4 Iowa, 509, and, as we think, upon sufficient reason. Bishop, in his work on Marriage and Divorce, (6th ed.) sec. 428, says: 'So, by the unwritten rule, alimony can not be ordered for the term of the wife's life, because it is a maintenance to her, while the husband's duty to maintain her ceases at his death.'"

At the time alimony was decreed complainant, her husband was dead, and as the right to alimony depends on the existence of a valid marital relation between the parties, the order allowing alimony was void and without jurisdiction. McKenna v. McKenna, 70 Ill. App. 344; Hazard v. Hazard, 197 ibid 612. As said by the late Mr. Justice Baker in the Hazard case, supra, "If the marital relation has been dissolved by a decree of divorce, the former wife cannot maintain a suit for alimony."

Karcher v. Karcher, general number 22643, opinion not yet reported, was a divorce case where the divorce was granted upon notice by publication, the right to award alimony being reserved for the future consideration of the court. After the decree personal service was had upon the defendant husband, and under a petition for allowance of alimony and solicitor's fees and an answer thereto, on a hearing upon these issues, an award of alimony was made, and we there said:

> "When the court by service of process or by entry of appearance secures jurisdiction of the defendant in personam, the court may proceed to adjudicate the right of the wife to alimony and in the usual way to enforce its payment at a term subsequent to that at which the decree of divorce was entered."

In the Karcher case the court had jurisdiction

of the person of the divorced husband at the time alimony was awarded.

Complainant relies upon Cox v. Cox, 192 Ill. App. 286, as analogous on fact and principle. That was a separate maintenance proceeding, and neither on fact nor principle is it analogous to the case at bar. It is not an authority sustaining the contention of complainant.

We hold that all of the orders entered subsequent to the entering of the decree for divorce, both before and after the death of complainant's husband, were void as having been entered without jurisdiction so to do.

The decree appealed from undertook to settle the rights of the assignee of Mead to his judgment against the Railway company. The Circuit court at no time had jurisdiction, either by personal service or appearance, of either of the assignees, Hayes or Sanford, and it is a strange doctrine, and novel to us, that a court without jurisdiction of the parties should in their absence proceed to settle their rights.

In the decree appealed from the assignments of the judgment obtained by Mead against the Railway company, by him to Sanford and by Sanford to Hayes, are held to be null and void, such course being pursued for the express purpose of clearing the way so that the Railway company may be made liable to complainant for the amount of her alimony decree. This action is entirely without precedent. Twice in courts of competent jurisdiction the contentions of complainant regarding the assignments of the Mead judgment against the Railway company had been adjudicated contrary to her claims, such assignments being held to be valid and enforceable.

In the case of Hayes against the Railway com-

pany in the District Court of Ramsey County, Minnesota, complainant intervened. By appropriate pleadings all of her contentions were set out, and the relief granted by the decree now being reviewed and in that suit sought was denied. Under complainant's pleadings all of the parties in interest were before the court and their rights were adjudicated, and in that suit the attack made by complainant upon the assignments of the judgment in favor of Mead and against the Railway company was adjudicated contrary to her contentions.

Complainant by an independent suit against the Railway company, Hayes and Sanford, individually and as administrator of the estate of her deceased husband, and John Wagner, Sheriff of Ramsey County, again attacked the bona fides of the assignments of the Hayes judgment against the Railway company and therein sought to enjoin the Railway company from paying the money due on the judgment to Hayes and to have the Railway company adjudged to pay the $2500 awarded by the Circuit Court to her for alimony and solicitor's fees, on the contention that the assignments of the judgment by Mead in his lifetime to Sanford and by Sanford to Hayes were void, and seeking to restrain the sheriff from executing the process issued on the Hayes judgment. In this case a temporary restraining order was issued and defendants ordered to show cause why the injunction should not be made permanent. All of the defendants answered and on issues joined there was a hearing, when all the parties in interest were before the court. It was finally ordered that the motion for a temporary injunction be denied and that the restraining order and order to show cause theretofore issued be in all things vacated and set aside. It will be observed that complainant was not forced into the jurisdiction of the Minnesota courts. She voluntarily

came into the Hayes suit as an intervenor and thereby invoked its aid and requested its judgment on her dispute in the matter then before the court. From the binding force and effect of its judgment thus procured she cannot now, because, forsooth, it is displeasing to her, escape. Complainant is likewise bound by the adjudication of the Minnesota court in the suit which she independently instituted against all parties in interest. Full faith and credit must be accorded the judgment of the Minnesota courts, as required by sec. 1 of article 4 of the United States constitution. Harding v. Harding, 198 U. S. 317.

It is urged that the Railway company should have proceeded by way of interpleader in this dispute and have brought all the parties in interest together in one suit. Be this as it may, there were obstacles which beset such a proceeding. The parties were residents of different States and therefore could not be corralled within one jurisdiction; furthermore, the intervening proceedings and the independent suit of complainant in the Minnesota courts succeeded in bringing all the parties in interest together under one jurisdiction, making possible a final determination of all their conflicting claims. No more could have been attained by an interpleader proceeding.

The proceedings in the Minnesota courts are found in the record by duly exemplified copies thereof, which are not challenged. It is claimed that the Judge failed to certify in the certificate of evidence that it purports to contain all the evidence heard on the trial. In the condition of this certificate of evidence it is apparent from a colloquy between counsel and the court that the Chancellor rendered his decision after all of

the evidence was heard. However that may be, there is no evidence which might have been heard which could have overcome the facts affirmatively appearing - that the questions in dispute were finally determined by courts of competent jurisdiction in the State of Minnesota, and that the Circuit court was powerless to proceed in the divorce suit after the death of complainant's husband.

Counsel for complainant urges on this court that the unanimity of the actions of five judges of the Circuit Court, sitting as chancellors, "should certainly and unerringly be an index that such contentions were well founded in law and equity." This contention is not at all appealing to us and cannot be permitted to influence our decision; for, were the whole Circuit bench unanimous in the entry of a decree which they were without jurisdiction to enter, it would be as readily reversed as if such error had been committed by but one member of the court. Furthermore, the Railway company has paid the Hayes judgment, forced thereto by final process of a court of competent jurisdiction in a cause in which complainant was a party and in which her rights and those of all the parties in interest were adjudicated. This cause is in a court of conscience and it would be unconscionable to require the Railway company to pay this judgment a second time. We are unable to suggest any proceeding available to the Railway company by which it could have avoided the seizure of its property and sale in satisfaction of the Hayes judgment, or any action it might have taken which would have prevented the recovery of that judgment.

The decree of the Circuit court appealed from

is reversed and the cause remanded with directions to the Circuit court to vacate all orders and decrees and dismiss all petitions, original, amended and supplemental, filed by complainant since the entry of the decree of divorce November 6, 1914.

REVERSED AND REMANDED WITH DIRECTIONS.

339 - 22773

WILLIAM J. JACKSON, Receiver of the Chicago and Western Illinois Railroad Co., Appellee,

vs.

M. PIOWATY & SONS, a corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 329

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for $158.07 entered on the finding of the court, to whom the cause was by agreement submitted for trial. The claim was for the balance of freight and other charges due plaintiff on certain tomatoes consigned to A. J. Flynn at Louisville, Kentucky, and re-consigned by Flynn to defendant. The tomatoes were originally shipped by A. F. Jewett of Jacksonville, Texas, from Pepperwine, Texas. It appears that plaintiff, on delivery of the tomatoes, presented a bill of charges to defendant for $28.98 as being the freight charges due upon the shipment, which bill defendant paid.

It is claimed that the bill was wrongly and inadvertently made; that it should have been for $187.68, and plaintiff contends that defendant is liable to pay it the amount which the trial court awarded, while defendant insists that when it paid the bill rendered its liability to plaintiff was discharged. It is not in dispute that $187.68 was the correct amount payable for freight charges. The trial was had under a stipulation of fact, in which is found the following:

"It is further stipulated and agreed that the said freight, icing and switching charges of one hundred eighty-seven and 68/100 dollars ($187.68), being one hundred fifty-eight and 70/100 dollars ($158.70) more than the amount of twenty-eight and 98/100 dollars ($28.98) paid by said defendant, were lawful charges based on the tariff rates contained in tariffs on file with the Interstate Commerce Commission at Washington, D. C., and in full force and effect at the time said shipment moved."

The defense is based on the contention that defendant was acting as commission agent or broker for the shippers and had not taken title to the goods, and that it had accounted to the principal for the proceeds of the shipment.

The rights of the parties rest in the contention as to whether plaintiff had actual notice of defendant's agency. The contention that the fact of defendant being in the commission and brokerage business was in itself notice to plaintiff that it was acting as an agent for the shipper of the tomatoes is not well taken. It does not follow that because defendant was a broker it did not have title to the property which it received through the railroad company from the consignor. No presumption in that regard can be indulged. Before defendant can relieve itself from liability for payment of the freight charges upon goods received by it, it must affirmatively appear that plaintiff had actual notice of the fact, if it was a fact, that defendant was acting as agent for the shipper. Defendant cannot be relieved from liability without proving actual notice that it was acting merely as an agent of the consignor. Furthermore, no hardship springs from the enforcement of this rule. Tariff rates were fixed by the Interstate Commerce Commission, of which consignors and consignees are bound to take notice, and the fact that the rates are on file at Washington is implied notice to all persons interested in such rates.

We are also of the opinion that defendant's liability was fixed by the contract of shipment, which pro-

vides that "the owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery." We think that the rule laid down in Union Pacific R. Co. v. American Smelting & Refining Co., 202 Fed. 720, is controlling of the situation before us. It was in that case held that an implied contract by the consignee to pay the freight charges on goods shipped under a bill of lading containing the stipulation, "the consignee or consignees paying freight," or any similar provision, arises from the acceptance by the consignee of the delivery of the goods under the bill, because the consignee knows that the carrier looks to him for the charges and by delivery waives his lien therefor in the faith that the consignee will pay them. In the case supra the consignee received a consignment upon which the transportation charges were $7549.70 and paid thereon $4610.86, refusing to pay the balance. Such balance was, however, adjudged to be payable in that suit.

Defendant is also liable under an implication that it will pay the transportation charges in view of its having received the goods consigned, and is further liable under the condition of the contract of shipment above quoted. It was held in Sealing v. Knollin, 94 Ill. App. 443, that the mere fact that a person is an auctioneer is not sufficient notice to purchasers that he is not selling his own goods, and that if an agent does not disclose his agency and name his principal, he binds himself and becomes subject to all the liabilities, expressed and implied, created by the contract and the transaction, in the same manner as if he were the principal in interest.

It is held in Boston and Maine Railroad v. Hooker, 233 U. S. 97, that knowledge of the shipper that the rate is based on value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Interstate Commerce Commission, and the effect of so filing the schedule makes the published rates binding upon shipper and carrier alike.

We are not impressed with the argument of defendant that the Interstate Commerce Act making a consignee liable for legal freight rates is unconstitutional, especially in view of the fact that counsel have failed to cite any authority supporting its contention.

The facts in the record sustaining the finding and the judgment thereon being supported by the law applicable thereto, the judgment of the Municipal Court is affirmed.

AFFIRMED.

342 - 22776

ABRAHAM SCHWARTZ,
Appellee,

vs.

HARTMAN FURNITURE & CARPET COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

205 I.A. 330

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal, and an examination of the record tends to impress us with the probable fact that plaintiff realizes that a defense in this court is futile.

The case has been twice tried and plaintiff succeeded on both occasions. The Judge at the first trial, evidently being dissatisfied with the verdict, gave a new trial, which new trial resulted in plaintiff's favor, from which judgment this appeal is prosecuted by defendant.

The relation of master and servant existed between the parties. The action is brought under the Workmen's Compensation Act. There is a fatal defect in the pleadings and proofs. It is neither averred in the petition nor was any evidence given upon the trial that any claim was made for compensation within six months from the date of the accident, May 6, 1913. The making of a claim within the six months period as required by the Compensation Act is mandatory and cannot be dispensed with; lacking proof of such claim within the time limited by the act, no right of action exists. This exact point has been decided in Haiselden v. Industrial Board, 275 Ill. 114, in which Mr. Justice Duncan said:

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"It is assigned as error that the Circuit Court erred in sustaining the findings and judgment of said board of arbitrators and of the Industrial Board of Illinois and in quashing the writ of certiorari, as there was no evidence in the record showing that any claim for compensation had been made to the plaintiffs in error by the said Charles Milbrandt within six months after the accident or after any payment made to him by plaintiffs in error, as provided by section 24 of the Workmen's Compensation Act of 1913. * * * Section 24 of the Workmen's Compensation Act of 1913 provides: 'No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made, within six months after such payments have ceased.' (Hurd's Stat. 1916, p. 1256.)

"The foregoing provision of the statute is mandatory and the evidence in the record clearly and positively discloses that this claim was barred because not made within the time provided by the statute. The Circuit Court erred in not so holding, and its judgment is therefore reversed."

The record before us fails to show that any payments under the Act were made by defendant to plaintiff at any time. Many other questions are involved, which from the view above expressed become unimportant. The basis on which a claim must rest for support, regardless of all other questions, not being present, there can be no recovery. The claim is barred because not made within the time provided by the act.

The judgment of the Circuit Court is reversed, and as there can be no recovery the cause is not remanded.

REVERSED WITHOUT REMANDING.

345 - 22779

LEOPOLD MIODUSZEWSKI,
Appellee,

vs.

STEFAN SPOGANITZ,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 331

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this appeal a motion to dismiss it for failure to have the appeal bond and the bill of exceptions approved within the time limited by the order allowing such appeal was reserved to the hearing of the cause. This motion must be allowed.

The judgment appealed from was entered June 27, 1916. The appeal was prayed and allowed to this court on condition that defendant file an appeal bond in the penalty of $1500 to be approved by a judge of the court within thirty days from the date of the judgment, and sixty days were allowed for filing a bill of exceptions. On the 22nd of July, 1916, the time for filing the bond was extended ten days, and on August 5, 1916, the bond was filed and approved by the trial judge. In apparent answer to a rule to file a new bond, defendant on August 22nd filed an appeal bond dated August 19, 1916, which was not approved either by court or judge. On August 25, 1916, the appeal bond was by order stricken from the files. On August 29, 1916, the order of August 25, 1916, was vacated and defendant ordered to file a new bond nunc pro tunc as of August 25, 1916. On August 30, 1916, the appeal bond found in

IMCO-OLD MICHELSEMER I.,
Appellee,

vs.

STERAN MCCORMICK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BOOKER DELIVERED THE OPINION OF THE COURT.

In this appeal a motion to dismiss it for failure to have the appeal bond and the bill of exceptions approved within the time limited by the order allowing appeal was reserved to the hearing of the cause. This motion must be allowed.

The judgment appealed from was entered June 27, 1916. The appeal was prayed and allowed to this court on condition that defendant file an appeal bond in the penalty of $1500 to be approved by a judge of the court within thirty days from the date of the judgment, and sixty days were allowed for filing a bill of exceptions. On the 22nd of July, 1916, the time for filing the bond was extended ten days, and on August 5, 1916, the bond was filed and approved by the trial judge. In appellee's answer to a rule to file a new bond, defendant on August 22nd filed an appeal bond dated August 19, 1916, which was not approved either by court or judge. On August 25, 1916, the appeal bond was by order stricken from the files. On August 28, 1916, the order of August 25, 1916, was vacated and defendant ordered to file a new bond nunc pro tunc as of August 22, 1916. On August 28, 1916, the appeal bond found in

the record was filed and approved by the trial Judge. The bill of exceptions was filed on the 27th day of September, 1916, ninety-two days after the entry of the judgment and the order allowing sixty days within which to file it. Neither the bond nor the bill of exceptions was filed within the time in which the court had jurisdiction to approve the same.

We think this case falls within the reasoning of People v. Wells, 255 Ill. 451, in which the court said:

> "There are no terms of the Municipal court and the period of thirty days is substituted as the time within which the court can modify, alter or vacate a judgment or entertain a motion for that purpose. * * *
>
> "The action of the judge in entering subsequent orders was not only contrary to the express provisions of the statute, but was contrary to the principles upon which justice is administered and the rights and interests of litigants, which require stability and finality in judgments."

The court had no jurisdiction to approve the bond after the lapse of thirty days from the entry of the judgment. By the Municipal Court Act, as well as by the express terms of the original order, the bond was to be approved by the judge. This did not require an order of approval by the court.

The motion to modify the judgment after praying and the allowance of an appeal did not have the effect to disturb the final judgment order or change the situation from what it then was. The appeal was taken from the proceedings antedating these orders. The subsequent actions of the court did not affect the finality of the judgment appealed from nor give the court jurisdiction to approve a new appeal bond after the expiration of thirty days from the entry of the judgment.

For the reasons assigned the appeal is dismissed.

APPEAL DISMISSED.

349 - 22783

EDWARD J. HALEY, surviving partner of Haley & Company,
Appellant,

vs.

CHICAGO CITY BANK,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

205 I.A. 333

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat and for costs entered upon the verdict of a jury, and plaintiff feeling aggrieved at that judgment appeals to this court and asks a reversal.

No questions arise upon the pleadings that call for our construction on this review.

It is glaringly apparent that there is no merit in plaintiff's claim; that he has suffered no damage; that the checks in controversy were rightfully paid by the defendant bank; that no one having a bona fide financial interest in these checks is complaining of their payment; and it is also quite evident that this suit is an attempt by plaintiff to acquire by legal proceedings money to which he is not entitled on any principle either of law or of sound ethics.

Two checks constitute the bone of contention in this case. One is for $2500 and the other for $1000. They were both given to one Mary A. O'Conner. The dealings out of which the checks arose were between plaintiff and Mary A. O'Connor, and not with the payee in the checks. The $2500 check was given for a note of Mary A. O'Conner for $2600, payable to the order of plaintiff, and the $1000

2021/1883

check was given for a note of $1100 signed by Mary A. O'Connor and one Ellen Culliton.

There is evidence in the record from which the jury might well find that both these notes had been paid before the instant suit was commenced. On the theory that there might be some doubt about the payment of the $1100 note and some question having been raised as to the genuineness of the signature of Ellen Culliton thereto, the court left to the jury the question of whether the signature of Ellen Culliton to the $1100 note was genuine, and they found it was. The endorsement on these checks of the name of Ellen Culliton was made by Mary A. O'Connor, and on that endorsement checks were paid.

Ellen Culliton has since died. Neither in her lifetime did she, nor did her representatives since her death challenge the right of Mary A. O'Connor to endorse the checks with the name of Ellen Culliton. If it were necessary under the evidence in this record we would assume that it was done with authority.

These checks were paid in the due course of banking, the $2500 check having been endorsed to one Joseph Hazzard and deposited in the First National Bank of Chicago, through whom it was collected in the usual way from the defendant bank. These checks were returned to plaintiff by defendants in due course with debit charge against his account, to which no objections were made at the time.

Plaintiff admits that Mary A. O'Connor told him that she and Ellen Culliton were doing business together and that it made no difference to her to which one he made the checks payable.

The evidence demonstrates conclusively that plaintiff received the consideration for which the two checks were given. He has received his money back with additions other than interest, consequently has suffered no damage, and is therefore not entitled to maintain this action.

No one but Ellen Culliton or her personal representative has any legal right to question the endorsement of her name on these two checks. If aside from fair dealing and ethical financial conduct any law is involved in this case, it is sufficiently stated both on fact and principle in Andrews v. Northwestern National Bank, 107 Minn. 196.

As the verdict and judgment appealed from conform to right and justice, the judgment of the Superior Court is affirmed.

AFFIRMED.

354 - 22788

MARIE MAHALEK,
Appellee,
vs.
MERCHANTS RESERVE LIFE INSURANCE COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

205 I.A. 334

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant is an insurance company which insures against death or accident on the assessment plan. It insured the life of Nicholas Mahalek under a policy dated August 14, 1912. Plaintiff is the beneficiary in that policy. The trial was before the court by agreement and eventuated in a finding and judgment for plaintiff of $1161.39, and defendant appeals.

Two defenses are urged in argument to defeat plaintiff's claim. One is, that the statement of the insured in his application for the policy as to his physical condition and health history were warranties and were false; and the other, that in the absence of proof of death as required by the terms of the policy, there can be no recovery. We will dispose of these points in the inverse order in which they are stated.

While it is true that no formal proofs of death contemplated by the policy were made, still, notice of such death was given to the president of the company, as defendant admits, who, when notified, said, "All right, they would go and see him." This afforded all the opportunity necessary for defendant to verify the death and ascertain the cause thereof.

We think, however, that the formal proofs contemplated by the terms of the policy were waived, as the de-

fendant based its refusal to pay upon the ground that the insured's answers to questions touching his health, past and present, were false. Furthermore, the pleadings admitted the death of the insured, leaving no issue on that question in dispute. The defense being placed on grounds other than the death of the insured, waived the notice of loss. Salt Co. v. Tennant, 144 Ill. App. 30. In Cash v. Home Insurance Co., 153 id. 31, it was held that without a special plea putting in issue the death of the insured, proof of loss was waived. Knickerbocker Insurance Co. v. Schneider, 131 U. S. CLXXII. Authorities to the same effect are numerous.

We do not think it necessary in this case to decide whether the answers to the questions made by the insured in the application for insurance were warranties or representations, because in the condition of the evidence, which is in some respects in sharp conflict, the court might fairly find that the answers of the insured to the questions were true and not false. Plaintiff testified regarding her husband's health that it was invariably good, and while defendant produced a doctor who testified that he told the insured that he had bronchitis and advised him to travel in the South, it was proved that defendant did go to Texas and Mexico, and that he was away from Chicago about one year. To offset this statement plaintiff, the wife of the insured, testified that she and her husband traveled in Texas and Mexico, and that he appeared to be in good health all the time and that the visit to Texas was not taken for her husband's health. He went there because he thought he could make more money, and there he worked at his trade; the stay in Madero, Mexico, was prolonged because of the political situation between that country and the U. S. A.,

which prevented him from getting earlier transportation to this country.

The insured worked constantly until the day previous to his death, and the day he died was Sunday. This is not contradicted. The insured was ailing for several hours before his death, although his wife did not consider his ailment of sufficient consequence to call in a medical man, and therefore a coroner's inquest was held to determine the cause of his death. The verdict returned by the coroner's jury found that the insured died "from organic heart disease." It is as well known to laymen as to medical men that a person may suffer from heart disease without knowing it, and that death therefrom may come suddenly. Therefore the coroner's finding of the cause of death did not even tend to prove that the insured consciously departed from the truth when he represented in his application for insurance that he did not suffer from heart disease.

There is no error in this record prejudicial to the rights of defendant.

Plaintiff, under the proofs in the record, was entitled to the judgment awarded her by the Circuit Court, and that judgment is affirmed.

AFFIRMED.

357 - 22791

ROBERT K. CANTWELL,
Appellee,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 335

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment for $177.31 in favor of plaintiff and against defendant upon an insurance policy. The policy of defendant insured plaintiff against accidents, and in it defendant covenanted to reimburse plaintiff for costs, charges and expenses arising from accident which caused any breakage in and about or to his automobile.

The statement of claim alleges that plaintiff's automobile collided with a post and as a result of such collision parts of said automobile were damaged, and that the total amount of expenses incurred as a result of such accident amounted to $195.27. Defendant admits that plaintiff held with it a policy of insurance against accidents, but denies the collision with a post or any other collision; denies that any damage was done plaintiff's automobile as a result of the alleged collision, and therefore repudiates any liability.

The evidence clearly demonstrates that plaintiff's automobile was not at the time in question in collision with any post or any other stationary object, as shown by the testimony of the man who drove plaintiff's car at the time of the alleged collision. He testified that he drove the car on the 7th day of April, the day of the al-

leged accident; that he had no accident in which he ran against a post and that he never told plaintiff that he had an accident and ran into a post; that as a matter of fact, the car broke down on the elevated crossing about six o'clock in the evening; that he had been running the car for about two years and was familiar with its operation; that he examined the car after it broke down and found that the brace holding the transmission was broken and let the transmission turn over and turned the housing off the differential; that there was a brace which supported the transmission that was under the car; that the transmission consisted of the shafting and housing; that the contact between the brace and the shafting or housing was at the transmission, which was under the front seat of the car. The brace that was holding the transmission broke; it was cracked; it broke the transmission and turned over the transmission and the bottom of the transmission came up and hit the control rod and the shifting rod and forced it in several pieces, so that the car could not be moved, and it stopped on the crossing; that the car could not be pushed off because the gears were wedged in; that the car was afterwards pulled to the garage.

While this witness had told another story at the suggestion of plaintiff, he testified that when he did so he acted under fear of plaintiff. We are impressed with the truth of his evidence as distinguished from his statement made under fear. It follows that plaintiff has no right of recovery and that the judgment appealed from is entirely unsupported by the evidence in the record.

For the reasons above recited the judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

357 - 22791 FINDING OF FACT.

The court finds that the damage to plaintiff's automobile sought to be recovered in this suit from defendant under an accident policy of defendant issued to plaintiff by it was not the result of or occasioned by an accident, as charged in plaintiff's statement of claim.

Index of text.

The worst fears can emerge in district's
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dent, as emerged in district's observers of claim.

362 - 22796

GROSSFELD & ROE CO.,
Appellee,

vs.

WILLIAM JUNKER CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 336

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $240 entered upon the finding of a trial Judge in an action upon a contract between the parties, in which defendant agreed to purchase from plaintiff 200 barrels of Arbuckle's Fine Granulated sugar, estimated at 80,000 pounds, at the price of $5.65 per hundred pounds. Defendant breached the contract, and in his affidavit of meritorious defense denied ever having ordered or agreed to purchase the sugar as set up in plaintiff's amended statement of claim, avers that it does not know that plaintiff is a corporation and calls for strict proof, and denies indebtedness in any sum. This affidavit puts in issue the making of the contract.

Junker, president of defendant, called as a witness for plaintiff under Sec. 33 of the Municipal Court Act, identified a letter written by himself to plaintiff, in which he said: "Our Mr. Spanier presented an order to you this day for two hundred (200) barrels of Arbuckle Fine Granulated sugar on the spot, against our contract of February 8th, 1915. He was informed that you were unable to deliver same and you also stated you could not give us any definite assurance as to date of delivery. Inasmuch as we could place these two hundred (200) barrels to advantage,

2051.V.336

provided we had same on spot, we desire to annul our contract with you for reasons aforementioned." This was an admission of the contract, and while defendant has failed to set forth this letter in the abstract, we have gone to the record and find it there; therefore defendant's defense fails.

Under the rules of the Municipal Court which are found in the record before us, the defendant is confined to the defenses made in the affidavit of defense.

The contract was proven, likewise the breaching of it by defendant's refusal to complete the purchase, also a re-sale of the sugar at $5.35 per hundred pounds, making a difference between the contract price and the market price at which it was subsequently sold, of 30 cents per hundred pounds, which totals the amount of the judgment. This is the measure of plaintiff's damages.

The affidavit of defense did not deny that plaintiff was a corporation, therefore it was not incumbent upon plaintiff to make any affirmative proof that it was a corporation. The affidavit simply stated that defendant did not know that plaintiff was a corporation; that was not sufficient to put plaintiff upon proof of its corporate existence.

There is no merit in the defense and the judgment of the Municipal Court is affirmed.

AFFIRMED.

365 - 22799

ARTHUR A. STILES,
Appellee,

vs.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE WEST CHICAGO PARK COMMISSIONERS,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

205 I.A. 338

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal in a mandamus proceeding in which the writ was directed to respondent commanding it to forthwith grant relator a pension as Captain of Police to the end that he may receive a pension of $1575 due him from and since June 3, 1914, to and including February 9, 1916, and a further pension of $900 per annum payable in equal monthly instalments of $75 per month beginning with March, 1916, and continuing thereafter subject to the laws pertaining to the police pension fund.

Relator's claim to a pension is in virtue of Sec. 339, chap. 105 R. S., which provides as follows;

> "When any person at the time of the taking effect of this act or thereafter shall have been duly appointed and have served for a period of 20 years or more upon the regularly constituted police force of said Board of Commissioners for such one or more towns, subject to the provisions of this act, or where the combined years of service of any person upon the police force of such board shall aggregate 20 years or more, said board shall order and direct that such person, after his services on such police force shall have ceased, shall be paid a yearly pension equal to one-half the amount of salary attached to the rank which he held on said police force for one year immediately prior to the time of such retirement. * *"

On June 4, 1914, relator was charged with having entered a saloon while in the uniform of a police captain of respondent and with having on certain other specified days used vile epithets and profane and obscene language

205.1/A.338

in violation of certain rules of the civil service board of respondent, and relator was on that day suspended from his employment without pay; that on October 16, 1914, relator after a trial upon said charges, was discharged from the service of respondent as captain of police, and by order of the civil service board it was ordered that his suspension without pay from June 4, 1914, be approved; that relator was present in person and by counsel at his trial and that witnesses were heard in his defense, which findings of the civil service board were certified to respondent; that relator's removalas captain of the police force of respondent became effective as of June 4, 1914, the day of his suspension; that since June 4, 1914, relator has on several occasions demanded of respondent payment of a pension of $900.00 per annum, which has been consistently refused.

The main contention and the only one which we shall now decide, is whether relator, having been discharged as captain of police for his misconduct, is eligible for a pension.

We are not called upon to review the action of the civil service board of respondent, therefore its finding that relator was guilty of the charges against him and ordering his discharge from the service is conclusive on all the parties. Furthermore, it has been held that entering a saloon while in a policeman's uniform is sufficient cause for discharge from the force. People ex rel. Hayes v. City of Chicago, 142 Ill. App. 103, in which the court said:

> "The doing of anything expressly forbidden and subjected to punishment by written rules of discipline provided by the department, especially such a plainly substantial violation of discipline as to enter a dramshop while on duty, but not in discharge of duty, is sufficient cause."

At the time of relator's discharge he had com-

pleted more than twenty years of service as a policeman on the police force, and thereafter and before said discharge was entitled to a pension under the statute supra. The crucial question requiring our determination is - What effect did relator's discharge for malconduct have upon his right to a pension under the act?

Two contentions on this subject are made - that by relator that under the act, when he had completed twenty years of service his right to a pension became vested; and that, though continuing on the force thereafter and being subsequently found guilty of misconduct, for which he was discharged, did not deprive him of that vested right; while respondent contends that the right to a pension is not a vested right, but subject to be defeated by discharge following misconduct, without regard to time of service. Broadly stated, these contentions resolve themselves into the proposition as to whether discharge for malconduct deprived relator of the pension which he otherwise would have been entitled to at his election. The Supreme Court of this State has not yet been called upon to decide whether the discharge of a policeman for misconduct prior to his application for a pension deprives him of the right to such pension.

This court is of the opinion that if the statute supra is to receive a literal construction, then, notwithstanding relator's discharge for misconduct, he having completed the requisite number of years of service, he can, at his election, avail of the statutory right to a pension, and that such right cannot be denied him. A majority, however, of the members of this court are of the opinion that the statute supra must not be interpreted lit-

erally, but must be read and interpreted in the light and manner of the decisions hereinafter referred to.

The New York statute on police pensions is very similar to our own, and contains no provision that the applicant for retirement must be in good standing at the tim he applies for such retirement, and in People ex rel. Hardy v. Greene, 87 N. Y. App. Div. 590, in denying the relator's right to be put upon the pension roll, the court said:

> "The pension roll is a roll of honor, - a reward of merit, not a refuge from disgrace, - and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior. If this view of the statute is correct, it follows that the relator's right to retirement * * was subject to his continued good behavior."

In the Hardy case, at the time the policeman sought a pension he was resting under charges which had not been tried, and the court said that "should he be unfortunately convicted and dismissed as a punishment his right to retirement would be lost by his own delinquencies." In passing upon the disciplinary effect of allowing a policeman to be placed upon the pension roll after having been convicted of misconduct, the court say:

> "If an intention existed to confer upon a favom d class the special privilege claimed by the relator, it should have been manifested by explicit expression. It should not be construed into the law, for its effect would be not only to work injustice upon the other members of the force, but to greatly impair the efficiency of the department as a whole; for nothing can be imagined more likely to discourage ambition, to destroy discipline or to stifle stimulus than the creation of a privileged class among the police who should be possessed by law of the absolute right to avoid the consequences of violation of duty by the mere voluntary adoption of an honorary retirement enriched by the enjoyment of a life annuity."

In People ex rel. Tuck v. French et al., 108 N. Y. 105, a policeman committed an offense subjecting him to discipline by the board, and ostensibly for the purpose

of evading trial and punishment he filed an application to be retired as a pensioner before the charges were preferred against him. However, charges were preferred and upon a trial he was found guilty and dismissed from the force. Under these circumstances it was held that he was not entitled to be retired and to be placed upon the pension roll. Under a similar statute in Wisconsin it was held in State ex rel. Weber v. Trustees, 123 Wis. 225, that where the relator was discharged for misconduct and prior thereto had an application for a pension pending, his discharge deprived him of the right to a pension. The court held that a right to a pension was not a vested right, but liable to be defeated by misconduct.

Relator sought by mandamus to be reinstated as police captain on the theory that the proceedings at his trial before the civil service board were had without jurisdiction and consequently were null and void; and it is urged that the pendency of such proceeding estopped relator from seeking a pension.

It is our opinion that these proceedings do not affect the situation nor impair the right of relator, if he had any, to a pension. The majority of this court is of the opinion that at the time relator demanded that he be placed upon the pension roll, he was not a member of the police force of respondent, and therefore not within the provisions of the pension statute supra; that the act is not subject to the construction that policemen discharged from the force for misconduct are eligible as pensioners; that the language of the statute that the board "shall order and direct that such person after service on such police force shall cease, shall be paid a yearly pension," etc., means by construction - where the service of a policeman

shall legitimately cease by a service of twenty years or more, and that such service shall cease voluntarily or by stress of physical troubles, and not by expulsion for malconduct. It seems to be axiomatic that the granting of a pension is a reward of merit to those who serve faithfully and who conform to the discipline of the department in which they serve, and those only, are entitled to avail of the pension statute - not those who are expelled from their office for misconduct. The latter are barred. The good of the service requires that the pension roll shall be composed of men who have honorably served, and not those who have been expelled for dishonorable conduct. To hold otherwise is to degrade and not ennoble the service.

The judgment appealed from is reversed and the cause is remanded to the Superior Court with directions to overrule the demurrer to the amended answer and to carry that demurrer back to the amended petition and to sustain it to such amended petition and to dismiss the cause at the cost of relator.

REVERSED AND REMANDED WITH DIRECTIONS.

Mr. Presiding Justice McBurely dissenting:

The statute makes an officer eligible for a pension by twenty years' service. By this opinion he is made eligible by twenty years' service plus such further time as he may serve without violating the rules of the force. It may be desirable to make this change by legislation; I do not believe it should be made by judicial construction.

368 - 22802

HARRY H. TALCOTT, JAMES S. BARSTOW personally and as Trustee for Fayette C. Barstow, Fanny B. Perkins and Dorothy B. Pettibone,
Appellees,

vs.

THE AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS and THE CONGREGATIONAL HOME MISSIONARY SOCIETY,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

205 I.A. 339

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed by Harry H. Talcott to ascertain, settle and decree the rights of the several parties in and to a fund of $5400 represented by a note of Charles C. and Mary Christensen secured by a trust deed conveying certain real estate in Chicago. The appellants demurred to a portion and answered the remainder of the bill. Upon a hearing before the Chancellor the demurrer was overruled and a final decree entered in which it was found that appellants had no interest in said fund, and the complainant Harry H. Talcott was directed to transfer the fund to James S. Barstow as trustee for Fayette C. Barstow, Fannie B. Perkins and Dorothy B. Pettibone. Of this decree appellants ask our review.

Appellants insist that an irrevocable trust in their favor was created by the following document, viz:

"To Mr. H. H. Talcott.

The notes I give to you in trust are as follows: H. H. Talcott, $850, dated August 15, 1892 - due 1895 H. H. Talcott, $850.00, dated August 15, 1892 - due 1896 Ada N. Brantingham, $1000, dated January 4, 1895 - due 1898 John M. Thacher, $3500., dated April 8, 1895 - due 1898.

I wish to have the use of this property during my life, having it kept at interest. In the event of my

death when money becomes due and is paid to you, I wish to have it disposed of in the following manner:

I give to 'The American Board of Commissioners for Foreign Missions' (A.B.C.F.M.).....$3,000.00.
To 'The American Home Missionary,' (Gen.O.O. Howard, now President)..... 3,000.00.
To Society for Prevention of Cruelty of Animals (preferably at Boston)..... 200.00.

$6,200.00.

If there should be any accumulations of interest while in your hands so that you should have more than the above amount, please give all such balance to Miss Mary McCowan's School for Deaf Children at Englewood, Chicago, Illinois. Please make the bequests in the name of 'A Friend' -

Signed by me this 8th day of August, 1895.
MATILDA S. BARSTOW."

For the notes mentioned Harvey H. Talcott on the 16th of August, 1895, sent Matilda S. Barstow a receipt with sundry observations which need not be repeated here, as we do not regard them as affecting the crucial question for decision as to whether the document above set out created an irrevocable trust in favor of appellants, which is their contention for reversal.

Eighteen years after the making of the foregoing document the maker, who was a maiden lady, died testate, disposing of her property by will, which was duly proven and admitted to probate in the Probate Court of the District of Chittendon in the State of Vermont, within the jurisdiction of which court she lived and died.

Harvey H. Talcott, to whom the document above recited was addressed, predeceased Miss Barstow, and the complainant in the trial court, Harry H. Talcott, succeeded Harvey as agent for Miss Barstow in Chicago. The notes in the document set forth, aggregating the sum of $6200, were years before the death of Miss Barstow paid and their proceeds otherwise invested. At one time real estate in Kenwood was acquired by a portion of it, and the Chittendon

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$4,000.00.

It there should be any accumulations of interest over and above $800.00 that sum shall be paid to the said Mary Ann Dickerson's Indowment for Deaf Children at Indianapolis, Indiana. Please note the provisions in the above Mary Dickerson Indowment for Deaf Children at Indianapolis, Indiana.

Signed by me this 8th day of January, 1860.

BATTISTA B. BENSTEAD.

Witness (Declaratory at Jackson)..... $80.00.

To Dentify the Department of Charity of
Chester, Ohio Institution..... $4,000.00.

To "Ohio Wesleyan Home Missionary," (Gen'l.O.O.
for Indexing Missions (A.B.C.F.M.).....$8,000.00.

I give to The Secretary Board of Commissioners
to be disposed of in the following manner:
Upon my own money pending the way is paid to Jon, I give

need are notified by a letter of it, and the obligation ceases thereafter. It has five lines remain in Jackson before the death of life Jackson Indy and until the document not later', eliminating the Son of Jason, and I grant to adopt its first Justice in Opinion'. She notes to Indexment to the first owner, Mary J. Jackson, and the residue was ultimately distributed five Justice, and of whom count are five and dies.

Susan F. Jaines, to whom the document where Jurisdiction is the life of Jackson', within the Jurisdiction wished to Indute to the Jurate Court of the District Court of Dec District of will', which was duly proven and ordered the same a matter of Jackson Indy Justice, and recorded in Jackson Indiana.

Jurisdiction Jones after the meeting of the District Court Indexes its Jackson.

Jackson is Jour of Jackson', which is Most convenient the same by it matter the Document which not not stopped on Jackson Indexes them be effecting the closing question the Jurisdiction would need not be Jackson Jate, or do to Jackson, 1860, Jour Indian J. Benston a Indict with

For the said mentioned Court J. Jackson on the

BATTISTA B. BENSTEAD.'

Signed by me this 8th day of January, 1860.

by 'a Jaines' -

Witness (Declaratory at Jackson)..... $80.00.

To Identify the Department of Charity of
Chester, Ohio Institution..... $4,000.00.

To "Ohio Wesleyan Home Missionary," (Gen'l.O.O.
for Indexing Missions (A.B.C.F.M.).....$8,000.00.

I give to The Secretary Board of Commissioners
to be disposed of in the following manner:
Upon my own money pending the way is paid to Jon, I give

note, which appellants claim, is said to be the residuum of that original fund. It may not be amiss to mention the fact, as having material bearing upon the rights of the parties, that neither the appellants nor any of the other beneficiaries in that document mentioned had any knowledge of its existence until made acquainted with the fact by the filing of the bill in the case at bar.

Fifteen years after the making of the document in question and after the death of Harvey H. Talcott, to whom it was directed, Miss Barstow wrote Harry H. Talcott concerning the $5400 parcel of said original fund then invested in the Kenwood real estate, as follows:

> "The understanding was that in the end this amount should go to the cause of missions - now unless I have reason to call for its use during my life, if it should be in your hands at the time of my death I have expressed my wish for its bestowal at that time."

In that letter Miss Barstow enclosed a memorandum requesting that the $5400 be given one-half to Mr. and Mrs. Lewis M. Canfield and the other half to American Board of Foreign Missions. Eight hundred dollars of the original $6200 was paid to Miss Barstow, leaving the $5400 in dispute now in the hands of the complainant Talcott.

There was other correspondence affecting the fund which we do not regard as being material to our decision, but we cite the foregoing instance as an evidence of fact that Miss Barstow did not regard the document in dispute as creating an irrevocable trust.

Complainant Harvey alleged in his bill "that question has arisen as to whether said fund referred to in the bill of complaint became impressed with a trust in

favor of the parties referred to in the bill of complaint other than those claiming under the estate of Mathilda S. Barstow." To this averment appellants interposed a special demurrer contending that the trust became established by the trust agreement of August 8, 1895, and that the voluntary gift to appellants was thereby fully completed; that the trust agreement could in no way be limited, changed or impaired by any action, letters, declaration or statement of the donor subsequent to August, 1895, when the trust was created and completed, and in possession of Harvey M. Talcott; that the correspondence attached to the bill, and all allegations in the bill, wherein it is claimed that the beneficiaries of the fund are in any way changed or limited, are wholly incompetent, immaterial and irrelevant, and in no manner can limit, change or impair the rights of appellants to said fund under said gift.

We think the issue on this demurrer presents the deciding point in the case, and if the demurrer was well taken the decree should have been in appellants' favor.

It seems quite evident from the document in question that Miss Barstow did not expressly or by implication divest herself entirely of dominion over the so-called trust property. In the first place, it is provided in the document that "in the event of my death, when money becomes due and is paid to you," $3,000.00 be paid to each appellant and to another $200, to be given "in the name of a friend." Analyzing these words for construction, it is evident that the condition on which the money should be paid never occurred. It was to be paid in the event of Miss Barstow's death "when money becomes due and is paid to you." The money, in fact, became due and was paid long before the

death of Miss Barstow, and lost its identity in other property. It is evident that Miss Barstow retained dominion over the notes, and so intended, during her lifetime. By the express words of the document she reserved the use to herself during her life.

Then the use of the word "bequests" in relation to the disposition of the fund created by the document is evidence of an intention that the document should act as a testamentary disposition of the fund. Eight hundred dollars of the principal was paid to Miss Barstow and appellants do not challenge the right of Miss Barstow to receive that money. If it was rightfully paid and received, it was because the dominion over it still remained with the donor.

Appellants contend that the trust created by Miss Barstow was irrevocable; that Harvey H. Talcott was, in the custody and management of the fund, the trustee of appellants; that neither Talcott nor Miss Barstow could by any act defeat such trust, and that Miss Barstow could not interfere with the trust by any testamentary disposition affecting it. We think, however, that appellants proceed upon wrong premises. Under the document called a declaration of trust by appellants, Harvey H. Talcott was the agent of Miss Barstow. At no time had appellants any equitable right or claim to any of the funds in the document mentioned or the funds arising therefrom at any subsequent time. The parties mentioned in the document were never to know of Miss Barstow; her name was never to be made known to them. If even by the consent of the parties in interest any of such fund or the property standing in its place should have been paid to appellants, they would

never have known from whom the gift came nor the source of the benefaction. They would simply have known that it was from "a friend," without any disclosure as to who that friend was.

This document smacks so much of a testamentary disposition that it might be held void as not fulfilling the legal requirements of a will.

It is, we think, patent that the Chittendon note was a part of Miss Barstow's estate at the time of her death and that it passed under the residuary clause of her will, and that the Chancellor was right in decreeing the note to James S. Barstow as trustee of the parties named.

Trubey v. Pease, 240 Ill. 513, in many of its phases is like unto the instant case. The property in dispute was delivered to a third person with certain directions of which the claimants had no knowledge, such knowledge coming to them - as in the case at bar - only after the alleged donor had deceased. The court quotes from Estate of Smith, 144 Pa. St. 428, in which it was said:

> "What is clearly intended as a voluntary assignment or a gift but is imperfect as such cannot be treated as a declaration of trust. If this were not so, an expression of present gift would in all cases amount to a declaration of trust, and any imperfect gift might be made effectual simply by converting it into a trust. There is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust was not in contemplation."

This holding is applicable to the instant case.

As both the Talcotts held the notes in the so-called trust document and the property into which they afterwards were merged as the agent of Miss Barstow, and as at the death of Miss Barstow the property remained undelivered to the so-called beneficiaries, the death of Miss Barstow revoked the agency. Jennings v. Neville, 180 Ill. 270.

Appellants' contentions utterly fail because

they are based upon the assumption that the trust was complete at its inception, and that the document of August 8, 1895, created an irrevocable trust. These contentions are refuted by the record. If the words "when money becomes due and is paid" were of controlling importance as designating a time when the trust fund should be paid to the beneficiaries, then the document would be void for remoteness. Orerar v. Williams, 145 Ill. 625. The original fund never came to the possession of Harry H. Talcott. It was returned to Miss Barstow, who made an independent agreement with him, under which the Chittendon note was obtained.

The notes set forth in the document of August 8, 1895, are not in existence. The parties to that document are dead. As appellants never acquired in any way, by that document or any other found in the record, any right or title to the Chittendon note, the decree of the Circuit Court is without error and is therefore affirmed.

AFFIRMED.

377 - 22611

D. T. CAHILL,
Appellee,

vs.

J. J. CAHILL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

205 I.A. 341

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $581 entered upon the finding of the court before whom the trial was had. The action is on a promissory note for $750, dated October 4, 1913, payable four months after date to the order of D. T. Cahill, with interest at 6% per annum, made by Dearborn Plumbing & Supply Co. and endorsed by A. W. Shipman and J. J. Cahill. The action is by the payee against defendant as one of the endorsers.

The defense is, that defendant was an accommodation endorser, that the note was dishonored for non-payment, and that no notice of such dishonor was given until about two months after the note became due.

Many immaterial matters are set up in the affidavit of defense. The pertinent ones are those mentioned. While defendant denied the demand was made for payment, plaintiff has positively testified that such demand was made on the day the note became due; that plaintiff met defendant downtown on the day the note was due, showed him the note and made a demand for payment and said to him that he wanted his money.

From the evidence the trial Judge might fairly find that the demand was made. Defendant, under the Negotiable Instrument Act, was an endorser of the note, and a demand for payment was necessary. This being an inland bill, no

protest was necessary, as protest by Sec. 135 of the Negotiable Instruments Act, Chap. 98 R. S., is required only of foreign bills. These questions are decided in Anshen v. Iglewitz, Gen. No. 22220, opinion not yet reported.

The parties to this case are brothers. Counsel for plaintiff in his brief has seen fit in his argument to refer to a scriptural instance, and says: "It might, at first blush, seem somewhat strange that appellant should endeavor to withhold this money from appellee, they being brothers, but, strange as it may seem, ever since Cain slew Abel and Joseph was sold into Egypt by his brothers for twenty-nine pieces of silver, brothers sometimes forget the ties of blood which bind them." We admonish counsel that in referring to biblical incidents accuracy of statement is essential. If counsel will refer to the 37th chapter of Genesis, verse 28, they will find that Joseph's brothers sold him to the Egyptians for twenty pieces of silver.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

381 - 22815

CHARLES W. WATKINS,
Appellee,

vs.

THE PEOPLES GAS REGULATOR COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 342

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $43.05 entered upon the finding of the trial Judge. The contest rests in a contract between the parties, in which defendant agreed to pay plaintiff 50 per cent of the gross income on all rental business that might be turned over and accepted by defendant which was secured by plaintiff or his agents. The parties had a dispute and the contract ended September 26, 1914. Subsequently defendant collected $86.10 on rental business turned over to it by plaintiff, one-half of which plaintiff claims and which defendant refuses to pay.

The whole contention rests upon the interpretation of the contract, defendant claiming that plaintiff was entitled to only one-half of what it actually collected on rental business turned over to it, while plaintiff claims that he is entitled to one-half thereof.

We do not construe the contract as requiring plaintiff to collect rentals, but to turn over to defendant rental business. As plaintiff turned over the business for which defendant collected, he was entitled to the measure of compensation provided in the contract. This is the amount of the judgment.

The question of whether the relationship of

master and servant was created by the contract is of no importance as affecting the rights of the parties to this suit.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

matter and account was created by the contract in or in connection or relation to the rights of the parties to said suit.

The Supreme of the municipal Court of Atlanta.

ANSWER.

388 - 22922.

JENNIE KIELMAN, Appellant.

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 343

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries in which, on a trial before court and jury, plaintiff recovered a verdict and judgment for $500, and plaintiff being dissatisfied with the amount of the verdict, seeks a new trial by this appeal, which the trial court refused to give.

The negligence charged was proven without contradiction, and the jurors had before them the fact that owing to the negligence of defendant, plaintiff, while in an automobile crossing the tracks of defendant while the gates guarding the crossing were up, the gates were suddenly lowered without the automobile being able to clear the tracks and one arm of the gate struck plaintiff on the forehead, injuring her. It is contended by plaintiff that as a result of the injury to her head, she had trouble at her accouchement of a child, being at the time of the accident seven months pregnant. This child lived and was in good health at the time of the trial. Subsequently plaintiff suffered two miscarriages, one when she was three months pregnant and the other when she was six months pregnant, and these miscarriages she attributes to the accident suffered through the negligence of defendant.

Defendant contends that there is no causal connection between the injury suffered and plaintiff's

connection between the injury sustained and plaintiff's
detriment continue that there is no change
sustained through the negligence of defendant.
treatment, and these circumstances are attributed to the
three months before and the other when she was six months
pregnant with twins. This only lived one week
per abnormality of a child, dying at the time of the
as a result of the injury to her head, she had traveled on
terrace, injured her. It is contended by plaintiff that
trance and one arm of the same stroke plaintiff on the
learned without the automobile being able to clear the
thereby the crossing more so, the lines were rendered
mobile crossing the tracks of defendant while the train
to the negligence of defendant, plaintiff, while in an auto-
diction, and the jurors may believe from the fact that being
ing on April 28th, plaintiff received a fractured collar bone
Attorney may judgment for $50, and plaintiff being
transmitted with the record of the verdict, being a mis-
trial on this appeal, which the trial court refused to give.

The negligence charged was failure without sufficient warning to stop the train before reaching the crossing, and to keep a proper lookout ahead for persons on the track. Plaintiff testified that he was driving a Ford automobile, and as he approached the crossing he looked both ways for approaching trains, but did not see or hear any. He was familiar with the crossing, having driven over it frequently. He was driving at a speed of about 15 miles per hour, and when he was about 15 feet from the track he looked to the north and saw defendant's train coming from the north at a speed of about 30 miles per hour. When he saw the train he was about 15 feet from the track. He did not stop his car before attempting to cross the track, but put on more speed in order to get across before the train reached the crossing. He was struck by the train when the front end of his car was about the middle of the track. He was thrown from the car and received the injuries complained of. He was rendered unconscious by the collision and remained in that condition for about two weeks. He was confined to his bed for about six weeks after the accident. He was under the care of a physician during that time. He testified that he had been earning $100 per month as a salesman for the Ford Motor Company, and that since the accident he had been unable to work at all. He testified that he had been earning $100 per month as a salesman for the Ford Motor Company, and that since the accident he had been unable to work at all.

maternal troubles. Evidence pro and con of a medical character was heard by the jury. The question as to what injuries were traceable to the accident were facts to be solved by the jury. The evidence is in sharp conflict. If the jury believed that the physical troubles suffered by plaintiff as detailed by her and her medical witnesses upon the witness stand had any causal connection with the accident to her, then the verdict is somewhat inadequate; but if the jury on the contrary believed, as they evidently did, that the maternal difficulties which afflicted plaintiff were not traceable to or proximately caused by the accident, then the compensation awarded is sufficient.

The jury's advantages in solving the questions of fact and passing upon the credibility of the several witnesses were much better than ours, because they saw the witnesses and observed their conduct - advantages denied us - and were therefore much better able than we to determine to whom to give credit. In this situation, we are not permitted to disturb the finding of the jury unless we can say that the verdict is manifestly contrary to the greater weight of the evidence (and this we are unable to do) or unless there are such errors in the rulings of the court upon the admission or exclusion of evidence or upon instructions which injuriously affected the cause of plaintiff.

We do not find any errors in the court's rulings on the evidence which tended to injuriously affect plaintiff's claim for damages. The most seriously challenged action of the court is the rulings on the testimony of

Dr. La Porte. This witness was plaintiff's family physician, who attended her immediately after the accident and since, in her several maternal troubles. Objections were made and sustained by the court to questions which called for the opinion of the witness as to the connection between the accident and the difficulties from which plaintiff suffered. Counsel for plaintiff then abandoned this line of examination and resorted to a hypothetical question which the witness answered and which it is unnecessary to here set out. On cross examination Dr. La Porte said that his answer to the hypothetical question was based on his knowledge of plaintiff's case and upon the matters set forth in the hypothetical question. Defendant thereupon moved to strike from the record his answer to the hypothetical question, and this motion was granted and an instruction concerning the ruling was thereafter given to the jury. Dr. La Porte's answer to the hypothetical question being confessedly based on his own personal opinion, as well as from the facts assumed and recited in the question, rendered his answer clearly incompetent and subject to the objection made, and the court did not err in ruling against plaintiff thereon.

Complaint is made regarding the rulings of the court on other matters during the trial, and also that there are errors in the court's rulings upon instructions. We have carefully examined all these questions and are unable to conclude that any action of the court or its rulings in the matters criticised injuriously affected the question of the amount of damages which the jury should have awarded. It was within the province of the jury to determine whether the serious ailments thereafter suffered

by plaintiff were proximately attributable to the accident or not. We cannot say that the finding of the jury is not supported by the evidence, and we are rather in accord with the jury's assessment of damages, for we are unable, after carefully considering the record, to find any warrant in ascribing the ailments of plaintiff as causally connected with her being struck upon the head by a crossing gate of defendant.

A case very similar on fact and principle has lately been decided by this court in Hosie v. La Salle, Gen. No. 22731, not yet reported. What we said there is equally applicable to this case, and as in that case we said, we here again repeat that "A judgment will not be disturbed upon review for mere inadequacy of damages awarded unless it is apparent that the verdict was the result of passion or prejudice in the jury or of errors of law by the court. These elements we do not find present in the instant case. Harper v. Black Diamond Coal Co., 142 Ill. App. 594; Hartwell v. Black, 48 Ill. 301." Fritz v. Chicago Railways Co., Gen. No. 22849, opinion coincidently filed with this.

There is no reversible error in this record, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

398 - 22832

CHRISTIAN C. H. BECKER,
Appellee,

vs.

BENJAMIN F. J. ODELL,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

205 I.A. 345

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure. The only defense interpolated is that it was agreed that the loan should be renewed. This agreement rested in parol and was not in writing. It is claimed that when defendant bought the property in question the person who had the note in his possession and was present as the representative of the owner at the passing of the conveyance, agreed that when the note matured it should be renewed and that the consideration for the agreement was the payment, in advance of its being due, of some interest thereon.

There is no evidence in the record which would warrant the court in finding that anyone acting with authority agreed to renew the loan at maturity. The proof failing to show any agreement to extend the loan by anyone acting with authority from the owner, the defense fails.

The decree of the Superior Court is affirmed.

AFFIRMED.

CHRISTIAN v. C. Evans.

Appellee.

Appellant.

CHRISTIAN F. J. Conte.

Appellee.

Appellant.

No. Appeal from District Court of Dixon County.

This is an appeal from a decree of foreclosure.

The only defense interposed is that it was agreed that the loan should be noticed. This agreement rested in parol and was not in writing. It is claimed that upon payment the mortgagee is directed the person who can give note in its possession and was present at the transaction. Beyond that when the note matured it should be renewed and that the slave of the owner at the meeting of the conveyance. Beyond consideration for the agreement was the payment, in advance of its being due, of usual interest thereon.

There is no evidence in the record which would warrant the court in finding that anyone acting with authority agreed to renew the loan if matured. The proof fairly agreed to renew the loan if matured. The proof failing to show any agreement to extend the loan if matured to whom was allowance to extend the loan if matured to whom was allowance to

notice with authority from the owner, the defense fails.

The decree of the Superior Court is affirmed.

AFFIRMED.

401 - 22835.

GEORGE R. STEWART, Appellee,

vs.

WILLIAM R. DODSON, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 346

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $1800 entered as in a default case. The pleadings are voluminous and complicated and, in the conclusions to which we have come, unnecessary to be here set forth. Waiving all other questions, we place our decision on the nullity of the contract, the basis of the action, as a gambling contract and offensive to and violative of Sec. 130 of the criminal code in force at the date of the contract. The contract in suit is an option contract and unilateral in its essence, as the option is invokable by plaintiff only. Defendant had no reciprocal right. The right to defend on the ground of illegality was saved to defendant by his pleading and affidavit of defense, which the court improperly eliminated from the cause.

It appears that plaintiff bought stock in the National Machine Recorder Company and long after such purchases and in no sense as a part of the terms of purchase, entered into the contract in controversy dated March 8, 1913. This contract recites that plaintiff had theretofore purchased of defendant two hundred shares of such stock and may be desirous of selling and disposing of the same, and if he is so desirous of selling the two hundred shares of stock "one year from the date hereof at nine dollars

per share," on thirty days notice of such desire before the end of the year, defendant will purchase at the price mentioned. It is further provided that defendant "shall have the right at any time on or before one year from the date hereof upon written notice by him and tender of the sum of eighteen hundred dollars to purchase said two hundred shares, and should said party of the first part (plaintiff) then be unwilling or refuse to sell the same, this contract shall thereupon terminate and be void without any further liability or obligation against either party hereto."

By no fair construction of this contract can it be said that defendant had any right enforceable at law to purchase the stock. If plaintiff failed to exercise the option to sell, the contract terminated.

This is not the case of the sale of a commodity where the purchaser takes from the seller a contract to repurchase as a safeguard against loss, and, on the part of the seller, as a guarantee that representations as to values made are true, and it does not come within the ruling of Bawden v. Taylor, 254 Ill. 464, or Osgood v. Skinner, 211 Ill. 229.

This contract is as much an optional contract as were the contracts involved in Webster v. Sturges, 7 Ill. App. 560, and Schneider v. Turner, 130 Ill. 28.

The contract sued upon is a gambling contract and obnoxious to Sec. 130 of the criminal code supra, and is therefore unenforceable in the courts.

The judgment of the Circuit Court is reversed, and

r.

her spine," or simply take notice of such having notice
the end of the year, sojourners all previous at the prize
mentioned. It is further provided that delinquent "small
pays the right at any time on or before one year from the
date hereof a like matter by him any member of the
same of eighteen hundred sixteen to perform and
natural owners, and enough said body of the time last
[plaintiff] then be mentioned or nature to call the same,
this contract shall thereupon terminate and be void without
any further formality or application against either party
hereto."

By no fair construction of this contract can it
be said that defendant had any right subsequently at law
to threaten the store. If plaintiff failed to exercise the
option to call, its contract terminated.

This is not the case of the sale of a warranty
where the purchaser takes upon the seller a covenant to
reimburse me a judgment against him, and, as was held
of the policy, on a guarantee that representations as to
value made are true, and if they are not within the
ruling of Bowden v. Taylor, 200 Ill. 494, or Deering v.
Kelcher, 211 Ill. 339.

This covenant is in case an original contract to
make the contents implied in Taylor v. Deering, 1 Ill.
App. 340, and Bonnifield v. Turner, 193 Ill. 82.

The contract sued upon is a familiar contract met
opportune to the 130 of the original note Cain, and is
therefore unobjectionable in the course.

The judgment of the District Court is reversed, and

as there can be no recovery on the contract, the basis of the action, the cause is not remanded.

REVERSED.

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as there was no contrary on the contract, the basis of the motion, the cause is not removed.

Motion.

405 - 22839

HELBURN LEATHER CO., a corporation,
Appellee,

vs.

BENJAMIN STONE and JACOB W. STONE, copartners doing business as STONE BROTHERS,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 347

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment for $195.89 entered upon the finding of the trial Judge.

The claim was for the agreed price of three bundles of leather which defendants bought of plaintiff through its Chicago representative. The goods ordered were shipped by plaintiff from Salem, Massachusetts, its place of business, to defendants at Chicago, where, under the agreement, the goods were deliverable. In common business parlance, the sale was f. o. b. Chicago.

We are of the opinion that the evidence fairly establishes the sale and the further fact that the goods were shipped to and arrived at Chicago. It appears that defendants did not receive the goods into their actual physical possession, but that the railroad company made delivery to another, a stranger to defendants and their business. In this situation defendants insist as a matter of law that it was the duty of plaintiff to prove an actual delivery to them, and failing to do so, there can be no recovery. To this contention we are not able to yield our assent. Such is not the law. Delivery f. o. b. Chicago meant that the goods should arrive in Chicago and when they did so arrive in the

[illegible]

[illegible]

[illegible]

usual and customary course of transit, the possession of the common carrier at Chicago was a symbolical delivery to defendants and effective to vest the title of the goods in defendants. When the goods arrived the duty of giving notice of arrival to defendants was on the carrier and if the carrier delivered the goods to the wrong party it was not the goods of plaintiff that were delivered, but those of defendants. Plaintiff could not maintain any action against the carrier for such wrongful delivery because the goods did not belong to it, as the title had been parted with to defendants, in whom it vested on arrival in Chicago. If any right of action exists for the wrongful or negligent delivery of the goods to someone other than defendants, that right is the right of defendants and none other. The law on this subject is well stated in Cook Brewing Co. v. Vaccaro, 188 Ill. App. 389, where the court say:

> "We agree with the contention of counsel for appellee, that as the contract provided that the beer should be delivered f. o. b. cars at Johnston City that it contemplated a delivery at this place. There is no doubt but that the general rule is that in the absence of an agreement as to the place of delivery, that the delivery by the vendor to a common carrier is a delivery to the vendee at the place at which the common carrier received the goods, and that the title to the property vests in the purchaser immediately upon such delivery to the carrier. City of Carthage v. Duvall, 202 Ill. 234. If, however, the contract provides that the shipment shall be f. o. b. cars at the vendee's home, or place of business, then the delivery to a common carrier will not be a delivery to the vendee, but it must be delivered to the vendee at his home or place of business before the title is vested in the vendee. Olson v. Wabash Coal Co., 126 Ill. App. 253."

The difficulty with defendants' contention is its misinterpretation of the words "home or place of business." We do not think the court used these words in their literal sense, but simply as designating the home town or city or place of business of the vendee, and that the court in legal intendment held that when the goods arrived at

their destination in the home town or place of business of the vendee the title then vested in the vendee. At least, that is our interpretation and our holding. The agreement f. o. b. Chicago put the burden of paying freight charges upon plaintiff. Without any such stipulation in the agreement defendants would have been bound to pay such charges from the point of shipment. The contention of defendants, if logically extended, would put the onus of carriage and its attendant expense from the railroad at Chicago to defendants' place of business upon plaintiff, which would be utterly absurd. Benjamin on Sales, § 181.

The propositions of law found in the record were presented to the trial Judge after the entry of judgment and he was asked to pass upon them nunc pro tunc as of the date of the judgment. This request was refused. They came too late, and the Judge in refusing to entertain them was within the law.

There is no reversible error in the judgment of the Municipal Court, and it is affirmed.

AFFIRMED.

408 - 22842

THE WEBER CHIMNEY COMPANY,
Appellant,

vs.

CLAUDE A. JOHNSON,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

205 I.A. 348

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of attachment. The attachment issues only were tried before the court with a jury, there was a verdict and a judgment thereon in favor of defendant, and plaintiff appeals.

The relation of the parties is that of employer and employee. The grounds of the attachment are that defendant Johnson is not a resident of the State of Illinois, that his place of residence is at Winburne, Pennsylvania, and that he is about to remove his property from Illinois, to the injury of plaintiff. The attachment writ was served on the Central Trust Company as garnishee, who answered that defendant had on deposit in its bank $5,549.73. Defendant traversed the grounds of attachment, denying all the grounds for attachment set up in the affidavit, and on this denial the cause proceeded to trial.

The major contention of plaintiff is that the verdict and judgment are contrary to the greater weight of the evidence. We are unable, after weighing the evidence, to conceive how the verdict and judgment could have been in plaintiff's favor. The whole case rests on the question of the non-residence of defendant. If ever there was a strong and impregnable case of residence, made out by competent evidence, this is that case. Every evidential fact

Abbeyliner.

Ann Cover Shelley Cover,

Abbeyliner.

Ann.

Clarice V. Cromwell.

Abbeyliner.

Miss Jane Elliott Rood

St Rose Academy.

2051.A.346

Ann. Shelley Rollins Patterson its Cotton Ed its Edge.

Type is an matter of attachment. The attachment
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fendant Johnson is not a resident of the State of Illinois,
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Ann. Shelley Rollins Patterson its Cotton Ed its Edge.

regarding the residence of defendant bears out his contention that that residence was in Chicago for more than five years prior to the suing out of the attachment writ. Plaintiff's contention that defendant's place of residence was at Winburne, Pennsylvania, is overcome and negatived by every evidential fact on that point in the record, even its evidence falling far short, standing alone, of fixing defendant's residence at Winburne or anywhere else but Chicago.

It is uncontradicted that defendant left Winburne in 1895 and has not since lived there, although there he seems to have been brought up, there his parents lived, and there he often visited until his mother died in 1912. Defendant was a traveling man, leading a roving sort of life occasioned by his occupation, in the service of his employers. He testified that his work took him all over the United States, Canada, and Cuba. In March, 1911, at the time plaintiff employed defendant, he was in Philadelphia, from which place he came to Chicago, making the latter city his home. It is true that in the prosecution of his employer's business he traveled extensively and was away from Chicago at long intervals; but when he came to Chicago he brought with him all of his personal property, including some money, which money he deposited in the garnishee bank, renting a safety deposit box in that bank. When he came to Chicago in March, 1911, he went to live at 1038 North LaSalle street, engaging a room there, in which place he lived when in Chicago. When away from Chicago for long periods he gave up his room, but always kept his trunk there. His landlady, Mrs. Anna Studyvin, so testified in corroboration of defendant. When defendant made short trips he bought one way tickets on the railroad; when he made long

trips, such as going to the Pacific coast, he bought round trip tickets. During the five years of his employment he made between twelve and fifteen trips to the coast. His trunk, his clothes, his money and his securities remained, during these five years of his employment with plaintiff, in Chicago; and about three years before the trial he voted in Chicago at a municipal election. During these five years defendant had no other residence than Chicago. While he had many stopping places of a more or less casual character, he acquired no other residence nor any property rights or interests in any other place, so far as shown by the evidence.

Defendant's business was that of an inspector of chimney construction. This was his employment with plaintiff, and for many years he held positions with other concerns of a like nature.

During the five years of his employment with plaintiff he carried a key to his place of residence, 1038 North LaSalle street, which key he had with him and produced at the trial, and this testimony was corroborated by the testimony of his landlady.

Charles Woodworth, vice-president of plaintiff, told defendant when he employed him that he would have to live in Chicago, and Bernard P. Weber, secretary of plaintiff, suggested to defendant upon his arrival in Chicago the neighborhood he should reside in, and to that neighborhood he went and stayed during all the time of his employment with plaintiff.

At the time of the suing out of the attachment writ defendant was in Chicago, subject to the service of

process within the jurisdiction of Cook County; plaintiff knew the place of his residence and where defendant could be found, and process in this suit was in fact served upon him on the day after the writ was issued; therefore no exigency existed necessitating a seizure of his property for debt. About the time of the suing out of the writ of attachment in this case defendant left plaintiff's employ and accepted a position with the General Concrete Construction Company, but there is no evidence that he removed any of his property from Chicago or made any attempt so to do, and no evidence that he was about to depart from the State.

An attachment is an extraordinary remedy and is strictly construed against the party seeking to enforce its drastic provisions. There are no presumptions in favor of plaintiffs in attachment suits. The grounds of attachment must be strictly proven. The question of residence is one of fact and is largely a matter of intent. Matzenbaugh v. The People, 194 Ill. 108.

The merits of this controversy are so strongly in favor of defendant that exactitude in the rulings of the court in procedure or on instructions was not imperative. There is no error in the rulings of the court on the evidence or in the giving or refusing of instructions which would warrant a reversal or the awarding of a new trial, as no other judgment than that found in the record would be warranted from the evidence.

There is nothing in this record which tended to prejudice the claim of plaintiff, and the judgment of the Circuit Court is therefore affirmed.

AFFIRMED.

418 - 22852

ARTHUR DIXON,
Appellee,

vs.

RUBY SCHWARTZ,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 349

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment on the verdict of a jury for $2149.75 against defendant and defendant appeals. It appears that the firm of Wurzburger Bros., composed of Jonas Wurzburger, Harry Wurzburger and Lee Wurzburger, were tenants of plaintiff, Arthur Dixon, of the premises at Nos. 295-297 Fifth avenue, Chicago; that the Wurzburgers went into bankruptcy, and subsequently a corporation known as the Central Knitting Mills was formed by the Wurzburgers and succeeded to the firm business; that under an arrangement made by the Wurzburgers a lease was agreed to be made by Arthur Dixon to the Central Knitting Mills of the premises theretofore occupied by the Wurzburgers, with the understanding that there should be a guarantor on the lease; with this understanding the lease in evidence was prepared, with a guarantee made and executed as follows:

"For value received, we hereby, jointly and severally guarantee the payment of rent, and the performance of the covenants by the party of the second part in the within lease, covenanted and agreed, in manner and form as in said lease provided. Witness our hands and seals this 22d day of April, A.D.1908.

Ruby Schwartz (SEAL)
Schwartz Bros. (SEAL)
By Ruby Schwartz.
J. Wurzburger (SEAL)
Harry Wurzburger (SEAL)
Lee Wurzburger (SEAL)"

Under that lease the Central Knitting Mills occupied and paid rent until March, 1913, when it moved

itself and its property to the city of New York, leaving unpaid as rent and taxes the amount for which the judgment in this case was rendered.

Dixon, the lessor, also exacted as a condition for his execution of the lease, not only that the lease should be guaranteed as above recited, but that the rent due from the Wurzburgers, $1200, should be paid. The $1200 was paid as agreed, and the lease was then signed and executed by Arthur Dixon.

It is contended that the verdict is contrary to the manifest weight of the evidence; that there was no consideration moving to defendant for his guarantee of the lease; that the guarantee of defendant was made subsequent to the execution and delivery of the lease by Arthur Dixon; that there are errors in instructions;,that the guarantee of defendant is not under seal; that defendant should have been given notice of the lessee's default; and that the lease was cancelled by agreement between lessor and lessee.

An examination of the evidence fails to sustain the contention that the verdict of the jury is contrary to its probative force. The testimony of Arthur Dixon and his son William is positive and, in this respect, corroborative of each other, that Arthur Dixon did not execute the lease until after it had been executed by the lessee and the guarantors had executed the guarantee thereof. It appears that the guarantee was first executed without the signature of defendant, but by Schwartz Bros. by Ruby Schwartz. Mr. William Dixon declined to accept the lease with the guarantee signed in that manner; it was then returned to defendant and he placed his signature thereon. The jury might well have believed, as we do, that when Arthur Dixon executed the lease Ruby Schwartz had signed the guarantee and delivered it so

signed to William Dixon who was acting for plaintiff.

The question of the time of execution by Arthur Dixon of the lease and by Ruby Schwartz of the guarantee is one of fact and was properly submitted to the jury. It was for the jury to say by their verdict which party's evidence they believed to be true. They gave credit to the testimony of Arthur Dixon and his son William in preference to the evidence of defendant and his witnesses, and with their conclusion we see no reason to disagree; in fact we are in entire accord with their finding. The jury were also justified in finding that there was no evidence establishing a cancellation of the lease by agreement of the parties. On both these points we think the circumstances and environment of the parties support and in many respects corroborate plaintiff's contention.

Our holding that defendant's guarantee was executed before the signing and delivery of the lease by Arthur Dixon eliminates the question of independent consideration; as in these circumstances no independent consideration was necessary.

It appears that neither a scroll nor the word "seal" appears after the signature of defendant to the guarantee, and it is claimed that therefore the guarantee is not under seal, so that there remains no inference of a consideration which attaches to an instrument under seal. We think Ryan v. Cooke, 172 Ill. 302, is decisive of this question. The signing of the other guarantors was concededly under seal, as such appears from the face of the guarantee. We say here as was said in the Ryan case, supra:

> "When a bond or other sealed instrument purports on its face to be sealed by all its signers, and there are several seals to it, but not so many as there are names, the court will presume that each person signing it adopted some one of the seals. (Davis v. Burton, 3 Scam.

41; McLean v. Wilson, id. 50; Reeves v. Preston, 20 Ill. 389.)"

Defendant is therefore held to have adopted the seal of one of the other guarantors as his own.

The guarantee in question is as broad in its terms as is the lease. King v. Tyler, 79 Ill. 248. The obligation of the guarantor became fixed upon default by the lessee, of which the guarantor was not entitled to notice. The guarantee was unconditional. Volts v. Harris, 40 Ill. 155. However this may be, commencement of the suit was sufficient notice.

To the contention that the Central Knitting Mills, the lessee, was in possession prior to the execution and delivery of the lease by Arthur Dixon, we reply that it is manifest that the possession of the Central Knitting Mills before the delivery of the lease, if there was such possession, was under Wurzburger Bros., and not as a tenant of Arthur Dixon. Wurzburger Bros. was by financial stress merged into the Central Knitting Mills, a corporation. The handing of the lease to one of the parties to procure the signature of a guarantor did not constitute a delivery thereof to the lessee. So far as Arthur Dixon and his rights under the lease are concerned, whatever may be the facts as to the possession of the corporation, such possession was not under the lease until that document was executed by the parties and delivered to the lessee by Arthur Dixon or his representative.

We fail to discover any errors in the instructions which prejudicially affect the defense.

The judgment of the Municipal Court does justice between the parties and it is therefore affirmed.

AFFIRMED.

321 - 22755

JOSEPH MAZUR, doing business as Joseph Mazur & Co.,
Appellee,
vs.
STANISLAW GODERSKI and IRENA GODERSKI,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 351

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $300 against the defendant in an action for real estate commissions due plaintiff as a broker, which was tried without the intervention of a jury before the court.

The questions here are solely of fact, and if the proofs of plaintiff sustain plaintiff's cause of action, we are not permitted to disturb the judgment unless we can say that the finding of the court was manifestly contrary to the probative force of the evidence, which we cannot do.

The transaction involved an exchange of real estate owned by defendants at number 1833 Evergreen avenue, for property numbered 1853 North Hoyne avenue, owned by Michael Jakubczak, all in Chicago. That the exchange of property was made is not denied. That the value of defendants' property was $12,000 is conceded. The defense is that plaintiff was never employed in the transaction. A review of the evidence of defendants fails in our judgment to overcome that of plaintiff, which is ample to sustain the judgment. It therefore follows that the judgment of the Municipal Court must be and it is affirmed.

AFFIRMED.

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502 - 21900

EDMUND H. STROUD, doing business as E. H. STROUD & CO., Appellant,

vs.

R. F. CONWAY CO., a corporation, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 360

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Edmund H. Stroud, doing business as E. H. Stroud & Co., brought suit against R. F. Conway Co., a corporation, to recover $668.68, the balance claimed to be due him upon the purchase price of a pulverizing machine. Subsequently plaintiff brought another suit against the defendant to recover the sum of $114, the price of certain parts sold to the defendant for repairing the machine. The two suits were consolidated. The defendant filed a counter claim to recover back $1,333.33 the amount which it had theretofore paid plaintiff on account of the purchase price of the machine. The case was tried before the court without a jury, and judgment was entered in favor of the defendant on its counter claim for $1,219.32.

It appears that plaintiff submitted a written contract dated May 17, 1913, for the sale of the pulverizing machine, which provided, inter alia:

> "The sellers hereby state that this machinery will receive Soft LIMESTONE * * * of good grinding quality and reduce it at the rate of 5000 lbs. per hour to a powder, * * * and as is their custom they hereby GUARANTEE three-quarters of said output."

The contract further provided that the defendant should install the machine at its own expense in accordance with the instructions of the plaintiff; that if within ten days or within a reasonable agreed time thereafter the machinery failed to give the stipulated results and written notice was given plaintiff stating the trouble or defects, and plaintiff did not within a reasonable time remedy such defects, then the defendant was authorized to return the machine and have its money refunded.

Upon receipt of this written contract, defendant inquired of a representative of the plaintiff what the words, "soft limestone of good grinding quality" meant. The latter stated he did not know, but would take the matter up with the plaintiff and advise the defendant, and on May 19, 1913, plaintiff wrote the defendant a letter stating:

> "We have received through Mr. Thos. W. Tate your request to explain what we mean by 'soft LIMESTONE of good grinding quality.'
>
> "In reply would say your Mr. Adair told our Mr. Stroud that you accept only that grade of stone for grinding, and we were able therefore to name the maximum output of the machine.
>
> "If this matter of the grinding quality of your stone is to be left an open question, we would base our guarantee upon an output of 4,000 pounds per hour instead of 5,000 pounds per hour, to be safe. * * *
>
> "You will notice our contract states that if the machinery does not do as guaranteed we will take it back and refund your money."

The contract was not signed until about July 8, 1913. The machine, together with blue prints designating the manner in which it was to be installed, were delivered to the defendant about July 28th. It was then installed by the defendant, who began to operate it about August 20th. A few days afterwards, defendant notified plaintiff

that the machine was not working properly, in that it failed to pulverize the quantity of stone provided for in plaintiff's guarantee. Thereupon plaintiff examined the machine, gave instructions and assisted in its operation in an endeavor to increase the quantity of stone pulverized. The machine failed to turn out the quantity of stone mentioned in the contract, and plaintiff again, at the request of defendant, endeavored to make the machine fulfill the terms of the guarantee, but was unable to do so. This operation was repeated, and after the machine was in use for about thirty-two days, and failing to pulverize the quantity provided for, defendant notified plaintiff that it held the machine subject to plaintiff's order.

The plaintiff contends that the court erred in admitting the letter of May 19th in evidence, for the reason that it varied the terms of the written contract. During the period when the parties were endeavoring to perfect the operation of the machine, September 22, 1913, plaintiff wrote the defendant complaining of the hardness of the limestone and other matters, as reasons why the machine failed to produce the quantity provided for and stated:

> "If you will refer to our letter of May 19th you will see you are getting an average of just about what we promised on hard stone."

From this it clearly appears that the plaintiff's own interpretation of the contract was that the written contract dated May 17th had been supplemented by his letter of May 19th. It is always allowable to look to the inter-

pretation placed upon the contract by the parties themselves, and under these circumstances we think the letter of May 19th was a part of the contract and therefore properly admitted in evidence.

Plaintiff next contends that the machine failed to produce the quantity of stone provided for in the contract because the defendant did not install the machine in accordance with the blue prints submitted by the plaintiff; that the manner of installation was materially different from that provided for in the contract; that the warranty presupposes that the machine be installed and operated as provided in the contract, that defendant's failure in this regard, which is conceded, was a violation of the express terms of the contract, and defendant therefore was not authorized to reject the machine and demand a refund of its money.

The machine was not installed in accordance with the plans and specifications submitted by the plaintiff. Evidence was introduced on behalf of the plaintiff tending to show that the machine as installed would not produce the quantity of pulverized stone that it would have produced had the defendant followed the plans and specifications. On theother hand there was evidence introduced on behalf of the defendant that tended strongly to prove that the machine as installed would produce a greater quantity of pulverized stone than had the plans been followed. The plaintiff testified that he objected to the manner in which the machine was installed, but there was evidence tending to show that he acquiesced in the installation as made, and it clearly appears that the chief reason given by plaintiff why the machine failed to produce the

quantity provided for, was that the quality of stone was too hard. We think there was ample evidence to justify the court in finding that the plaintiff had waived any objection to the manner in which the machine was installed, and that the machine as installed would produce more pulverized stone than if it had been installed in accordance with the plans and specifications submitted.

From what we have said, it follows that the court did not err in refusing certain propositions of law submitted by the plaintiff.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

quantity produced for, was then the quality of wines was
one year. As time there are ample evidence to justify
the court in finding that the plaintiff had waived any
objection to the manner in which the machine was installed,
and that the machine as installed would produce wine
delivered wines then if it had been installed in accord-
ance with the plans and specifications submitted.

Even what we have said, it follows that the court
did not err in refusing certain hypothetical questions
asked by the plaintiff.

Finding no reversible error in the record, the
judgment of the municipal court of Ottawa is affirmed.

ATTACHED.

524 - 21922

ISAAC W. PRITCHARD, Appellee,

vs.

MARGARET McGREGOR, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 382

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Isaac W. Pritchard, as executor of the estate of Sarah P. Doane, deceased, filed a bill to construe the will and codicil thereto of the deceased. After issue joined, the cause was heard by the chancellor and a decree entered. Margaret McGregor, one of the defendants, prosecutes this appeal.

By the terms of the will six pieces of real estate were devised to different persons for life with remainder over in fee to the Chicago Foundlings Home. The will was duly admitted to probate in the County Court of DuPage County, and appellee duly qualified as executor and entered upon the discharge of his duties. The executor, under authority which he claimed was given him by the will, endeavored to collect rent from the various pieces of real estate, but the devisees objected, claiming that he had no such right. Afterwards, appellee brought forcible entry and detainer suits in the Municipal Court of Chicago to obtain possession of the real estate, and in order to determine what his powers were under the will, the bill in this case was filed.

The will first directs the payment of last illness and funeral expenses, and all just debts of the deceased. Immediately following is item 2, which so far as material, provides: "After the payment of my debts and funeral expenses, I hereby give, devise and bequeath to my sister, "two certain lots located in Chicago, during her natural life, then to certain other relatives for life, with the remainder over to the Chicago Foundlings Home. Then follows items 3, 4, 5 and 6, each of which begins, "I give, devise and bequeath."

It is contended by appellant that all of the deceased's debts are made a charge upon the two lots described in item 2. The decree holds that the words, "after the payment of my debts and funeral expenses," did not make such debts and expenses a charge upon the two lots described in that item, and we are clearly of the opinion that this construction is correct. We think it clear that the testatrix did not intend to make her debts and expenses a charge upon the real estate mentioned in item 2.

Item 7 of the will nominates and appoints appellee executor and contains the following provision: "and I order and direct that my executor shall have full and exclusive possession of my entire estate until its final distribution."

It is contended by appellee that the words just quoted authorized and empowered him (there being a deficiency of personal assets to pay the debts of deceased) to collect the rents of the real estate until such time as he shall have collected a sufficient amount

to pay the debts. On the other hand appellant contends that the appellee is given no such power; that he has no power at any time to collect the rents derived from the real estate, but that his power and authority is, in case of a deficiency of personal assets to proceed in the County Court to sell the real estate to pay the debts. Furthermore that as the evidence is not preserved in the record and as there are no findings of specific facts in the decree, the decree must be reversed.

Appellee, however, contends that there are sufficient findings in the decree, in that it finds that the court "has full and complete jurisdiction of the subject-matter and of all the parties hereto, and that the allegations of facts contained in said bill are true as therein stated." This is not the law. It has long been an established principle in this state in chancery cases, where there is an answer on file denying the allegations of the bill, that if the specific facts proven on the hearing are not found in the decree, the party obtaining the relief must on appeal sustain the decree by preserving such facts by a certificate of evidence and a general finding similar to the one above quoted has been repeatedly held insufficient. Village of Harlem v. Suburban R. R. Co., 202 Ill. 301; Torsell v. Riffert, 207 Ill. 621; Berg v. Berg, 223 Ill. 209; Becklenberg v. Becklenberg, 232 Ill. 120; Chman v. Chman, 233 Ill. 632; Grays Lake M.E. Church v. Metcalf, 245 Ill. 54.

However, from the allegations of fact in the bill and the admissions in the answer and from the decree, the following facts appear: that the deceased died leaving the will set up in the bill; that it was admitted to probate by

the County Court of DuPage County, Illinois; that appellee was duly qualified as executor; that the deceased left her surviving certain heirs at law; that she died seized of the real estate described in the will and in the decree, and that a controversy arose as to the true intent and meaning of certain provisions of the will. We are, therefore, of the opinion that appellee was justified in asking the Circuit Court for a construction of the will so that his powers and duties might be clearly defined.

The sole purpose of the construction of a will is to ascertain the intention of the testator that effect may be given to such intention, when not contrary to public policy or in contravention of law, and this intention must be determined from an examination of the entire will. After a careful examination of the will and codicil in the case at bar, we are of the opinion that no power or authority was given appellee to collect any rents from the real estate involved, and we think the words quoted from item 7 and now under consideration can apply only to the personal estate, if any. The provision that the executor shall have exclusive possession of the entire estate until final distribution could not apply to the real estate, as there was no distribution to be made of the real estate, for upon the death of the testatrix, the title immediately vested under the will in the devisees.

Considerable is said in appellee's brief and argument in regard to an order alleged to have been entered by the County Court of DuPage County in the matter of the estate of the deceased construing the will as contended for now by appellee, and it is contended that such order is

res adjudicata of the question here involved. As there is no admission in the pleadings and no finding in the decree in regard to this matter, the question is not before us. However, there is no merit in this contention. County Courts have no jurisdiction to construe wills.

Appellant complains of the allowance of a fee of $75 to the guardian ad litem of the minor defendants, on the ground that there was no evidence upon which to base such allowance. In a case of this kind, the court is presumed to know what the reasonable value of the services of the guardian ad litem is, and we cannot say that the alowance was improper.

The decree of the Circuit Court is correct and is affirmed in all respects, except as to the construction of the words above quoted from paragraph 7 of the will. As to the construction placed upon such part, the decree is reversed and the cause remanded with directions to modify the decree in accordance with the views herein expressed.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

541 - 21939

FERDINAND SCHIMANSKI, by Otto Schimanski, his father and next friend,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 364

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Ferdinand Schimanski, a minor, by his father and next friend, brought suit against the Chicago Railways Company to recover for personal injuries. There was a verdict and judgment in favor of the plaintiff for $2,250, to reverse which defendant prosecutes this appeal.

The evidence tends to show that at the time plaintiff was injured, October 8, 1911, he was about eight years of age; that on the day in question, which was Sunday, he, together with another boy, who is referred to in the record as Edward Palich or Edward Balet, at about one o'clock P.M., left plaintiff's home on Dickson street just north of North avenue. North avenue extends east and west in Chicago and is intersected at right angles by Dickson street. The boys walked east to Lincoln Park. About six o'clock P.M. they proceeded to return home and boarded a westbound North avenue car at Clark street. As the car was approaching Dickson street, plaintiff and his companion went to the rear of the car and asked the conductor to stop at Dickson street to permit them to

opinion of the court.

Reginald Eglemeyer, a minor, by his father and next friend, Prentiss will replace the Dearing Refrigerator with a new one for personal injuries. There was a verdict and judgment in favor of the plaintiff for $3,500. In leaving which settlement pleasure this appeal.

The evidence tends to show that at the time plaintiff was injured, October 3, 1911, he was about one o'clock p.m., just [illegible] in front of [illegible] Jackson street just north [illegible]. Both streets [illegible] Jackson street. The [illegible] Jackson. Just [illegible] and [illegible] Chicago and is intersected at right angles [illegible] Jackson street, [illegible] to it the record as Edward Dalton or Edward Dalet, [illegible] Thursday, in [illegible] with another jack, one is [illegible] years of age; that on the day in question, which was [illegible] was injured, October 3, 1911, in one [illegible]

The evidence tends to show that at the time

Appellant.

Appellee.

Appellee,

Appellant.

alight. The car stopped at the west side of Dickson street, and as plaintiff was in the act of alighting, his clothing caught, the car started forward, and he was thrown to the ground and injured. No one seems to have seen him fall, but immediately after the car proceeded westward, persons living on the south side of North avenue saw plaintiff lying on the pavement just between the north curb and the westbound track. He was unconscious. Plaintiff was removed to a drug store where he received medical attention, and was taken to his home in a police patrol wagon.

The defendant contends that the verdict is against the manifest weight of the evidence; that the case is what is known as a "blind "case, in that neither the conductor nor the motorman nor any other person, other than the plaintiff, testified to the occurrence of the accident; that the plaintiff's testimony in this regard is contrary to the physical facts and unbelievable; that plaintiff testified that as he was alighting from the car his coat caught on the upright in the center of the back platform, such an upright being only in what is known as a pay-as-you-enter car; that the height of the boy, and the manner in which he testified his clothing caught demonstrates that the accident did not occur in the manner testified to by the plaintiff. It is further argued that no one connected with the defendant company knew of the accident, no report having been made thereof until long after it had occurred; that the evidence conclusively establishes that the cars in use on the North avenue line at that time were not of the pay-as-you-enter type, but were of the old style type, and that there was no upright

in such cars. Complaint is also made that the plaintiff's version is not corroborated by anyone; that his companion was not produced nor his absence accounted for. We think, however, that the record clearly shows that the companion was placed on the witness stand, but was mentally defective and unable to answer questions.

There is no dispute that the plaintiff was seen lying north of the westbound track a short distance west of Dickson street immediately after a car of the defendant passed going westward and before it reached the next cross street, and that he was unconscious when found. After a careful consideration of all the evidence, we are clearly of the opinion that the jury were warranted in returning a verdict for the plaintiff, and this too, even if the plaintiff's description of the car and the manner in which his clothing was caught was inaccurate as to some of the details.

Defendant next contends that the court erred in refusing to instruct the jury, as requested by it, that no recovery could be had under the first count of the declaration and that it should be disregarded. The negligence charged in this count is, that while plaintiff was on the rear platform and riding as a passenger, and in the exercise of ordinary care for his own safety, defendant negligently operated the car, and by reason thereof, the plaintiff was thrown to the ground and injured. It is argued that there was no evidence that the plaintiff was riding on the car at the time of the accident, but that the testimony shows that the car was at a standstill, and while plaintiff was attempting to alight, the car started forward with a jerk. This same objection is also made

to instruction No. 6, given on behalf of the plaintiff. There is no merit in this objection. The argument is exceedingly refined, in a degree hypercritical, and altogether unwarranted. Furthermore there is evidence to sustain the third count, and it is the law that it is not reversible error to refuse an instruction denying the right of recovery under certain counts where there is evidence tending to prove the allegations of other counts. Weifenbach v. White City Construction Co., Gen. No. 21407, Appellate Court, First Dist.; Scott v. Crendorff, 245 Ill. 460.

Complaint is also made of the refusal of the court to give instruction No. 5, offered on behalf of the defendant. This instruction was to the effect that unless the jury believed from a preponderance of the evidence that the defendant negligently started the car while the plaintiff was in the act of alighting and plaintiff was thereby injured, their verdict should be for the defendant. This instruction seems to be based on the third count of the declaration. We think the jury were fully instructed on this point by plaintiff's instruction 6 and defendant's instruction 12.

Instruction No.4, offered by the defendant and refused, stated that unless the plaintiff proved his case by a preponderance of the evidence -- that if the evidence was evenly balanced, or if the jury were in doubt, they should find the defendant not guilty. The jury were told in several instructions that the plaintiff must prove his case by a preponderance of the evidence, and therefore the court did not err in refusing this instruction.

to instruction No. 8, given on behalf of the plaintiff.
There is no merit in this objection. The statement is
correct, stated (but not under the plaintiff bears the
burden of proof), or if the jury were in doubt, they
were legally entitled, in a medical malpractice case
of a disagreement of the evidence -- that if the evidence
was equally balanced, or if the jury were in doubt, they
should find the statement not proved. The jury were duly
instructions that the plaintiff must prove its
material allegations by a preponderance of the evidence, and therefore the
refusal of requested charge was not error in refusing this instruction.

Instruction No. 9, offered on behalf of the defendant was
in accordance with the plaintiff's instruction 8 and defendant's
instruction 12.

Complaint is also made of the refusal of the court
to give instruction No. 8, offered on behalf of the defend-
ant. This instruction was to the effect that unless the
jury believed from a preponderance of the evidence that
the defendant negligently failed the can apply the plain-
tiff was in the act of fighting and plaintiff was thereby
injured, their verdict should be for the defendant. This
instruction seems to be based on the idea that if the
testimony. By virtue the jury were fully instructed on
this point by plaintiff's instruction 8 and defendant's
instruction 12.

Defendant next contends that the judgment is excessive. The evidence tends to show that plaintiff was a normal, healthy boy prior to the injury; that he was found in an unconscious state immediately after the accident and remained in that condition for some time; that there was a swelling on the right side of his head about the size of a hen's egg; that there were bruises on his nose and a slight hemorrhage from the nostrils; that his chest and both knees were bruised and the latter swollen; that while the doctor was examining him immediately after the accident plaintiff vomited a substance tinged with blood; that he was confined to his bed about two weeks and remained out of school about the same length of time; that up to the time of the trial, which was nearly three years after the accident, he suffered headaches and dizziness, and there was evidence tending to show that by reason of the accident plaintiff had become and epileptic. After a careful review of all the evidence, we are clearly of the opinion that the judgment can in no way be said to be excessive.

We regret that before making the order of affirmance, we must say something more. Counsel for plaintiff, in their brief and argument, have in effect charged the defendant with suppressing facts, and the same is true with reference to certain witnesses produced by the defendant, all of which are without the slightest justification. The language used in many instances is unbecoming, unwarranted and undignified. The purpose of a brief and argument is to assist the court to a correct decision of the case. We, therefore, feel that we cannot, having due respect for the high regard we entertain for the profession

and the dignity of the courts, permit the brief to pass unrebuked.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

and the dignity of the Courts, permit the trial to proceed unobstructed.

The judgment of the Superior Court of Cook County is affirmed.

Affirmed.

644 - 22042

PAUL E. GIERZ,
Appellee,

vs.

JOHN RUS and PETER SOUKUP,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 375

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Paul E. Gierz brought an action on an appeal bond against John Rus and Peter Soukup. A declaration was filed, claiming debt in the amount of $1,000 and damages of $425. To this the defendants filed two pleas; (1) non est factum, and (2) nil debit. By agreement the case was tried before the court without a jury. The issues were found for the plaintiff and his damages were assessed in the sum of $1,000, on which finding judgment was entered. The judgment was similar in form to one that would be entered in an action of assumpsit. The defendants excepted and prayed an appeal to this court which was allowed upon filing a bond and leave was given to file a bill of exceptions. The appeal bond was approved and filed; no bill of exceptions, however, was filed. After the expiration of the term at which the judgment was entered, and after the appeal bond had been approved and filed, the court, on motion of the plaintiff, entered the following judgment:

> "On motion of attorneys for the plaintiff that the judgment entered herein on the 10th day of May, A. D. 1915, be corrected in form and it appearing to the court that the clerk of this court had incorrectly transcribed said judgment it is therefore ordered that said judgment be corrected in form and that said form as corrected be as follows:

"Now comes the parties to this suit by their respective attorneys and by agreement of the parties hereto a jury having been waived and this cause having been submitted to the court and the court having heard the evidence and argument of the attorneys and being fully advised in the premises find the issues for the plaintiff and finds that the amount of the debt herein is one thousand dollars ($1,000) and finds the plaintiff's damages to be the sum of four hundred and sixty-four dollars ($464).

Therefore it is considered by the court that the plaintiff, Paul E. Gierz, do have and recover of and from the defendants, John Rus and Peter Soukup, his said debt of one thousand dollars ($1,000) and his said damages in the sum of four hundred sixty-four dollars ($464) in form as aforesaid by the court assessed together with his costs and charges in this behalf expended and have execution therefor."

The defendants excepted to the entry of this order. Numerous errors have been assigned and argued, but in the view we take of the case, it will be unnecessary to consider but one, namely, that the order amending the judgment after the expiration of the term at which it was entered was not merely a matter of form, but of substance. It has been repeatedly held in this state that after the expiration of the term at which a judgment has been entered it can be amended only in matters of form. Ayer, et al v. City of Chicago, 149 Ill. 262; Tosetti Brewing Co. v. Koehler, 200 Ill. 369. We think it clear that the amendment of the judgment so sought to be made was not a matter of form, but one of substance, and therefore the court was without power to make the amendment. The action being debt on a bond, the judgment should have specified the amount of the debt and damages, and judgment should have been rendered for the debt to be satisfied upon payment of the damages. Caldwell, et al v. Richmond, 64 Ill. 30.

"See cases like Perrin in this suit by
their respective attorneys and by agreement of
the parties herein & they having been waived
and this cause having been modified to the
extent and the court having heard the evidence and
argument of the attorneys and being fully advised
in the premises finds the issues for the plaintiff
and finds that the amount of the debt barred is
$[illegible] and finds the plaintiff's damages to be one or four hundred one-
sixty-four dollars ($400).

"Considering it is unclaimed by the courts that
the plaintiff, Neal T. Crane, do have and recover
of and from the defendants, John Doe and Peter
Roman, the sum of one thousand dollars
($1,000) and his costs herein expended in the sum of four-
hundred sixty-four dollars ($464) to find as stipu-
lated by the court aforesaid together with his costs
and charges in this behalf expended and have exe-
cution therefor."

The defendants excepted to the entry of this
order. Thereafter motions were duly prepared and argued,
but in the view we take of the case, it will be unnecessa-
ry to consider but one, namely, that the order sustaining
the judgment after the expiration of the term at which it
was entered was not merely a matter of form, but of sub-
stance. It has been repeatedly held in this state that
after the expiration of the term at which a judgment was
entered it may be changed only in matters of form.
Black, 22 Pl. & Pr. 1111 et seq. For cons.: Hendrix
Bristow Co. v. Spradley, 200 S.W. 288. In order it clear
that the amendment of the Judgment in entirety is in fact not
not a matter of form, but one of substance, and therefore
the court was without power to make the amendment. The
mere fact that no objection seems to have been made
during term time to such amendment, and judgment
entered thereon as a fact, the judgment thereby made
not a matter of form, but one of substance, and therefore
the court was without power to make the amendment. The
mere fact that no objection seems to have been made
during term time to such amendment, and judgment
entered thereon as a fact, the judgment thereby made

As the evidence, on which the judgment was entered is not preserved in the record, there is no way of ascertaining the amount of the damages, and we are unable to enter a proper judgment in this court.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

435 - 21851.

ANATOLE KLINTZ,
Appellant,

vs.

WALTER Z. MARX, ZERO MARX,
REUBEN H. DONNELLEY and
CHICAGO TELEPHONE COMPANY,
a corporation,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 378

MR. JUSTICE GOODWIN delivered the opinion of the court.

The appellant seeks to reverse the action of the Circuit Court in sustaining appellees' demurrer to his bill of complaint. The bill, in substance, set out that for more than forty years prior to his death, one Zero Marx successfully carried on the business of manufacturing, selling, and installing signs, and had incorporated this business, in December, 1892, under the name of Zero Marx Sign Works, which was the name under which he had been doing business as an individual; that said corporation conducted a large and lucrative business in the City of Chicago, and became widely and favorably known; that on account of the sickness of said Zero Marx, the company became insolvent, was put into involuntary bankruptcy, and a receiver was appointed for it; that it was adjudicated bankrupt, and leave of court was given to the receiver to sell its tangible assets; that the receiver proceeded to sell its tangible assets, its good will, and the right to use its name; that thereafter the court entered an order approving and confirming this sale; that no appeal from the order was taken, and the bankrupt never applied for its discharge in bankruptcy, and has never since engaged in business; that the good will and the right to use the name of the Zero Marx Sign Works were of great pecuniary value to the appellant, and that after the sale he leased the premises formerly occupied by the bankrupt, and continued to engage in business at that place. The appellant further sets up that the appellees Walter Z. Marx and Zero Marx, sons of Zero

Marx, were at one time engaged with him in the business of the Zero Marx Sign Works, and were, or claimed to be, stockholders in that company; that in 1913, they severed their connection with the corporation, and organized a corporation known as Marx Brothers Sign Company, which engaged in business at No. 250 West Huron Street, Chicago, about a block and a half from the place of business of the Zero Marx Sign Works, and continued to do business at that place until December, 1914, when the company was forced into bankruptcy; that said appellees then entered into a co-partnership under the name of Marx Sign Company, and established their office at 175 West Jackson Boulevard, Chicago; that the co-partnership does not manufacture or install signs, and has no employes, but is engaged solely in the business of soliciting orders for signs, which it transfers to manufacturers. The bill further recites that the Chicago Telephone Company is engaged in the business of supplying the public with telephone service, and that in that connection furnishes a directory through the instrumentality of one Donnelley, who also prints another directory known as the Chicago Classified Telephone Directory; that appellant and the Marx co-partnership were both patrons of the company, and that in the directories the appellant uses the name Zero Marx Sign Works, as well as his own name; that after appellant purchased the good will and the right to use the name of Zero Marx Sign Works, the appellees Walter Z. Marx and Zero Marx, in fraud of his rights, and in addition to their corporation's own appropriate name, inserted the names "Zero Marx Signs" and "Marx Zero Signs," together with the telephone number and address of their co-partnership; that their action in this regard is unfair competition in trade, and tends to confuse, mislead, and deceive persons seeking to do business with appellant; that appellees Walter Z. and Zero Marx solicit and obtain business by falsely representing to prospective customers that they are

the successors in business of the Zero Marx Sign Works; that telephone calls intended for appellant are answered by the said co-partners, and persons giving such orders have been mislead and deceived by them into believing that they were doing business with appellant, the successor of Zero Marx Sign Works, and that by reason thereof appellant has lost, and will continue to lose, a large amount of business. Appellant asked that appellees Walter Z. and Zero Marx be enjoined from such practice, and the Telephone Company and Donnelley be enjoined from inserting the names "Zero Marx Signs," or "Marx Zero Signs," or any other name or names so similar to the name "Zero Marx Sign Works," as would naturally tend to induce the public to believe that the persons using such names had succeeded to, or were carrying on the business formerly conducted by the Zero Marx Sign Works.

Two questions necessarily arise on the face of the pleadings; first, did appellant lawfully acquire the right to use the name Zero Marx Sign Works, and second, did the action of appellees constitute unfair competition in trade. The contention of appellees is that it is beyond the power of a bankruptcy court to invest the receiver of a bankrupt with power to sell the good will and the right to use the name of a bankrupt corporation. It is not denied that the court may lawfully authorize a receiver to sell perishable property; therefore appellees' contention must go to the extent of maintaining that the good will and right to use the name of a corporation cannot constitute perishable property. In the case of In re Pedlow, 209 Fed. 941, it was held that the term "perishable property," as used in General Bankruptcy Order XVIII, authorizing the bankruptcy court in its discretion to sell perishable property at private sale, is not limited to property which may deteriorate physically, but includes that which is liable to deteriorate in price and value.

It may be added that the language of the order is not "perishable property," but if "a part or the whole of the bankrupt's estate is perishable," etc. It is obviously possible that the value of the right to use a trade name may depend upon continued usage. The determination of whether or not this was true in the instant case was a matter to be determined by the bankruptcy court, and we are without power in this collateral proceeding to review that question. It is obvious that the bankruptcy court had the power to order the sale of the intangible assets in question, and having the power to order them sold, it obviously had the power to ratify and confirm a sale which had already been made. In the case of In re Harvey, 122 Fed. 745, where the trustee had sold at public auction certain real estate of the bankrupt, the court said, at page 746:

> "The sale was without previous authority from the court, but it was duly confirmed and the confirmation was equivalent to a prior order."

As to the second point raised, we think there can be no doubt but what the facts set forth constitute a case of unfair competition in trade. The use of the words "Zero Marx Signs," and "Marx Zero Signs," in the telephone directory, and the manner in which the appellees Walter Z. and Zero Marx are alleged to have carried on their business, would obviously mislead the public into believing that they were the successors to, and had the right to use the name of, the Zero Marx Sign Works.

Nor is there, in our view, any validity in the contention that the appellant himself, by using the words "Zero Marx Sign Works," was perpetrating a fraud upon the public. A trade name is an asset which may lawfully be sold, and one purchasing it has the right to use it, and that trade names are frequently thus transferred is a matter of common knowledge. It clearly follows that one who uses a trade name thus purchased does not thereby represent that he is, in fact, the identical person who formerly used the same name; he represents no more than that he

has the lawful right to do business under the name which he is employing.

In view of our conclusion that the appellant, by the allegations of his bill, shows ownership of the right to make use of the name "Zero Marx Sign Works," and has shown acts of the appellees which infringe his right to the exclusive use of that name, and constitute unfair competition in trade, it follows that the action of the chancellor in sustaining demurrers to the bill was erroneous. The decree is reversed and the cause remanded to the Circuit Court for further proceedings in harmony with the views herein expressed.

REVERSED AND REMANDED.

448 - 21846.

EDWARD McGOWAN, by Patrick H. McGowan, his father and next friend,
Appellee,
vs.
CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 378

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment against it for $2,000, recovered by the appellee, a minor, in an action for damages for personal injuries alleged to have been sustained through the negligence of appellant. The original declaration charged that while appellee, then thirteen years of age, was attempting to cross Western Avenue, and was in the exercise of all due care and caution for his own safety, appellant carelessly, improperly and negligently ran certain of its cars in a southerly direction on Western Avenue after crossing Archer Avenue, where appellee was crossing, so that a car struck him and crushed his left leg. This declaration was filed November 22, 1912, and on October 22, 1913, an additional count was filed in which it was charged that appellant invited appellee to ride upon one of the cars, and while he was so riding, appellant caused the cars to be jerked and bumped, and thereby appellee was thrown off from said car and upon the street, and the wheels of said car passed over his left leg and injured him. A second additional count was filed upon the same theory. Afterwards, December 5, 1914, a further count was filed, charging a failure to comply with the municipal ordinance prohibiting the use of trailer cars, to which was added a count setting out the ordinance requiring street railway companies to provide each car with a fender, so as to guard passengers and pedestrians from being injured or thrown under the wheels of the cars, and a final count which charged that while appellee was lawfully present on

No. 205 I.A. 378

In the District Court delivered the opinion of the Court.

Western Avenue, appellant carelessly, wrongfully, wilfully and wantonly caused a certain train of cars which were being operated in an easterly direction along Archer Avenue, to be quickly and rapidly reversed without warning, and operated in a southerly direction along Western Avenue, and to run into and strike with force and violence appellee.

When the case was submitted to the jury, the court instructed the jury that the appellee could not recover under the original declaration, directed them to disregard it, and to find the appellant not guilty as to it. The court further instructed the jury that the appellee could not recover under the first of the two additional counts filed December 5, 1914, which related to trailer cars. No cross errors have been assigned. The case, therefore, went to the jury upon the counts charging that appellee was injured while riding on the car at the invitation of the appellant; that he was injured by reason of a violation of the fender ordinance, and that he was injured through the wilful and wanton misconduct of the appellant. It may be said at the outset that there was no evidence of any invitation by appellant to appellee to ride on its cars, and appellee did not seek a verdict on that theory; consequently, there was nothing to justify a recovery under the first and second additional counts filed October 22, 1913. The question presented is as to whether the judgment can be sustained under the two remaining counts.

The evidence disclosed that a motorman and conductor went with a trolley car to Rockwell Street near Archer Avenue, four blocks from Western Avenue, and there attached the trolley car to four dismantled, open, summer car bodies placed on temporary trucks, for the purpose of taking them to the car-barn at 69th Street and Emerald Avenue; when they did this, they found a number of boys jumping on and off the cars. The conductor attempted to keep them off, but they continued getting

on and off until the trolley car with the dismantled cars reached Western Avenue by way of Archer Avenue. The trolley car then switched the summer cars attached to it onto the north-bound track on Western Avenue to a point north of Archer Avenue; the four summer cars were then pushed by the trolley car over the cross-over to the south-bound track, and proceeded south on Western Avenue. The conductor was on the trolley car, which was in the rear of the other cars; the summer cars were not equipped with fenders. The testimony of appellee and the boy who was with him was to the effect that they looked in each direction, noticed the train was then on the north-bound track, saw no cars or train on the south-bound track, and proceeded to walk east across the tracks; that as he was walking across, he was struck by the front car, knocked down, and his foot run over. Evidence was offered on behalf of the appellant tending to support its theory that appellee was injured while attempting to let down the running-board on the side of one of the open cars. In support of it, it offered testimony tending to show that appellee had stated to a policeman who took him home in the patrol wagon that he was hurt while riding on the cars; that in reply to the policeman's question as to how he was hurt, he replied, "Oh, I was riding on the cars, and I slipped and fell, and got my foot crushed." This was denied by appellee. There was also testimony on behalf of appellant that the cars stopped before they reached Archer Avenue, and consequently must have been moving very slowly.

Appellant contends that it was error for the court to permit the fender ordinance to be received in evidence on the ground that it was not, either in its terms or in its intention, applicable to a case where a dismantled car was being moved from one place to another. The ordinance provided that, "Every person or corporation controlling any street railway

in the City shall equip and provide each and every car used on such street railway with fenders, * * * and which shall be securely attached to the front end of such car so as to guard passengers or pedestrians from being injured or thrown under the wheels of such car in case of a collision or other accident." The first question which arises is as to whether the cars in question come within the designation, "each and every car used on such street railway." The verb "use" is defined as "to make use of; to convert to one's service; to avail one's self of; to employ;" (Webster's New International Dictionary) and also, "to employ for the accomplishment of a purpose; turn to account; make use of;" (Funk & Wagnalls' Dictionary). It clearly appears from the evidence that the dismantled and discarded summer cars which had been placed upon temporary trucks and were being moved to the company's car-barns, were not being used on the railway within any of the definitions given, and the other ordinance offered in evidence and relied upon in one count of the declaration shows that these cars, since they were trailer cars, could not be lawfully used or employed anywhere in the City of Chicago. The question is not as to whether, as a matter of public policy, the terms of the ordinance should be broad enough to cover the case in question, but as to whether its terms actually did cover, and we are clearly of the opinion that they did not. It may well be that the scope of the ordinance is not limited to cars actually at the time engaged in transportation, or otherwise in actual service, and we go no further than to hold that the cars in the present instance did not come within its terms. The action of the court, therefore, in receiving the ordinance in evidence was erroneous and for that reason the judgment of the Superior Court must be reversed. But we are of the opinion that there is another valid objection which compels such a reversal. The only remaining count upon which the verdict

could rest is the one charging wilful and wanton injury. The question of what constitutes wilful and wanton injury has been frequently discussed by our Supreme Court. In Chicago City Ry. Co. v. Jordan, 215 Ill. 390, the court said, at page 397:

> "'Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act.' (Chicago, Burlington and Quincy Railroad Co. v. Johnson, 103 Ill. 512.) There there is a particular intention to injure, or a degree of willful or wanton recklessness which authorizes a presumption of an intention to injure generally, the act ceases to be merely negligent and becomes willful or wanton. In such a case there may be an actual intent to injure, or such a conscious or intentional disregard of the rights of others as to warrant a conclusion that an injury was intended. The true rule was stated in the case above cited, that in negligence, merely, there is no purpose to do a wrongful act or omit the performance of a duty, but that there may be such a dereliction of duty as will furnish evidence of a willful or wanton act."

When the evidence in this record is read in a light most favorable to appellee, we are of the opinion that there is a complete failure to establish this charge. There is no competent evidence sufficient to sustain a finding that the cars in question were being pushed along the track at an excessive rate of speed, and there is nothing in the surrounding circumstances shown which would, in our judgment, warrant a jury in saying that the conduct of appellant's servants in moving the cars in the manner in which they were shown to have been moved, constituted wilful or wanton misconduct.

The judgment of the Superior Court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

456 - 21854.

ED. C. SMITH FURNITURE CO.,
Appellee,

vs.

PETER & VOLZ,
Appellants.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

205 I.A. 379

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellants seek to reverse a judgment against them for $274.00 for damages alleged to have been suffered by appellee, who did business under the name of Ed. C. Smith Furniture Co., as the result of a breach of a contract for an exclusive agency for the sale of appellants' school furniture in Harris County, Texas.

The evidence disclosed that after some preliminary correspondence appellee wrote appellants, offering to carry their line of goods if he were given the exclusive agency for Harris County. Appellants replied as follows:

> "In reply to your letter of the 22nd will say that we are glad to note that you will accept our agency for Harris Co. We will give you the exclusive agency for that county and should we happen to close up with some one else for Texas we will not allow them to handle our desk in your county. We will advise them that that is your exclusive territory and that they must keep out of there."

Thereupon appellee placed an order for appellants' goods and made bids for contracts to supply school furniture to the school boards at Brunner and Houston Heights. It appears that W. C. Willis & Company submitted bids for the same contracts, at figures slightly under those submitted by appellee, and was awarded the contract. There was ample evidence to sustain a finding that Willis & Company acted as agents for appellants, and the closeness of the bids, taken together with the other evidence in the record, warrants the conclusion that had it not been for the bids of appellants' agent Willis & Company, appellee would have been successful. There is also sufficient

505 1A. 379

competent evidence of the amount which appellee would have made had he obtained the contracts.

The first question raised is as to whether the agreement in regard to the exclusive agency constituted a binding contract. There was an offer on the part of appellee to become the agent of the appellants and place an order for their goods if he were given the exclusive agency for his county. Appellants accepted the offer in writing, and appellee proceeded to purchase appellants' goods and enter actively into the work of promoting their sale. We think it is impossible to say that these facts did not create a binding and enforceable contract. The extent to which the parties were bound, and the duration of the contract, are not matters before us; it is sufficient to say that the facts disclosed by the evidence constituted a breach on the part of appellants for which appellee was entitled to recover. The evidence in regard to damages consisted of the price lists of appellants, the amount of appellee's bids, and a computation as to the net cost of the goods delivered at the Brunner and Houston Heights Schools. The evidence was competent, and, in our opinion, furnished a proper basis for the computation of appellee's damages. Appellants object to the introduction of a copy of the following telegram from appellee to appellants:

> "School business just opening. Several large deals to be closed this week. Mr. Willis showing your samples. We expect protection in Harris County. Wire answer."

The original telegram filed with the telegraph company would have been the best evidence. Appellee laid a foundation for the introduction of the copy by accounting for the destruction of the original. The telegram itself was competent to show that appellants had notice of the activities of Willis.

Counsel for appellants criticise certain instructions on the theory that the exclusive contract with appellee was for the sale of appellants' desks. The contract clearly shows that it was for the exclusive agency "for your line for Harris County." But if appellants' contention were accepted, it would still be true that by breaching the contract and permitting another agent to bid against appellee for the sale of appellants' desks, appellee lost in each case the entire contract for desks, which constituted the bulk of the contract, and for the other supplies as well, and, therefore, in any event, the measure of the damages is the value of the contracts lost. Counsel also complain of the second instruction, which told the jury that while the law permits a defendant in a case to testify in his own behalf, nevertheless, they have a right, in weighing his evidence and in determining how much credence is to be given to it, to take into consideration the fact that he is the defendant, and that he is interested in the result of the suit. Had appellee also testified, it would have been erroneous to single out the appellants, but as he did not, the instruction was proper.

As we find no error in the rulings of the court, the judgment is affirmed.

AFFIRMED.

475 - 21871.

FRANK M. McKEY, Trustee in Bankruptcy of the Estate of Aamax Cabinet Company, Appellee, vs. FRANCIS CROPPER COMPANY, Appellant. } APPEAL FROM COUNTY COURT, COOK COUNTY.

205 I.A. 381

MR. JUSTICE SOODWIN delivered the opinion of the court.

The appellant seeks to reverse a judgment for $400.00, entered against it in compensation for damages alleged to have been suffered by the appellee on account of appellant's breach of the following contract:

"Chicago, November 21st, 1913.

Francis Cropper Co.,
318 N. Michigan Ave.,
Chicago, Ill. Attention of Mr. Struve.

Gentlemen:-

We will make cabinets for you of size and dimensions as per your sample, with window glass, hangers, brass hinges, Forg's springs and brass knobs, mission stain and waxed oak finish, for an order of five thousand (5000) for Two Thousand Seven Hundred Fifty-Five Dollars ($2755.00). You are to have one thousand (1000) of these on or before December 20th, and the balance as quickly as possible thereafter, and not later than February 15th. Terms, net cash no discount. In this figure we include the putting on of decalcomania which we are to furnish, and which will consist of your firm's name and 'Chicago,' in 1/2" letters subject to approval, one sample to be submitted before proceeding with the work.

Yours very truly,
Aamax-Hoffmann Cabinet Works.
Per Max G. J. Hoffman.

MGJH:S

Accepted for The Francis Cropper Co.
C. A. Struve."

A sample was submitted to appellant, and afterwards a thousand boxes were substantially completed, and the rest partially completed. Appellant refused to accept any portion of the boxes, on the ground that they were not as ordered. From the record it appears that the inside depth of the sample submitted by the appellee was identical with that of the one referred to in the contract. While the evidence disclosed that its length was 16-1/8 inches and breadth 11-1/8 inches, as compared with 16-7/16 inches and 11-7/16 inches, this

505 I.A. 381

variation of a little more than 1/4 of an inch in one dimension and a little less than 1/4 of an inch in another, is nowhere shown to have been material. The question of whether the boxes manufactured were in accordance with the terms of the contract was one for the jury, who had an opportunity to inspect both the sample referred to in the contract and the one offered in evidence. The question, also, of whether appellant, by its own actions, had prevented the completion of the boxes at the time stipulated in the contract, and if not, whether it had waived that provision, was also one for the jury, and we are unable to say that their conclusions in favor of the appellee were manifestly against the weight of the evidence.

For appellant it is further contended that there was no evidence upon which the jury could base a finding as to damages. Had the appellant rescinded the contract before any work was done, the damages would obviously have been the difference between the cost of manufacturing and the contract price. The evidence did disclose, however, that at least one thousand of the boxes were substantially, although not entirely, completed, and thirteen hundred of the order were in various stages of manufacture. There was also evidence that the boxes were of no value to appellee, and had no market value, and that the total salvage on the entire 2,300 boxes would not exceed $45.00.

In view of the fact that, according to appellee's evidence, there were a thousand boxes substantially completed for which it would have been entitled under the contract to $550.00, and that there were thirteen hundred other boxes in various stages of manufacture, we are unable to say that a verdict for $400.00 is not sustained by the evidence. In these circumstances, the judgment of the County Court will be affirmed.

AFFIRMED.

494 - 21398.

SAMUEL BARNETT,
Appellee,

vs.

THOMAS STANTON, et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 382

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment entered against him and another for damages on account of their failure to perform a written contract entered into between them and appellee, by which appellee agreed to purchase and they agreed to sell certain real estate for the sum of $8,900. This contract contained the following provision:

> "This contract and the said earnest money shall be held by Stanton & Son for the mutual benefit of the parties concerned, and after the consummation of the sale he shall be at liberty to retain the canceled contract permanently; and it shall be the duty of said Stanton & Son in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses incurred for the vendor by his agent in said matter, and second, to the payment to vendor's broker of a commission of ____ per cent on the selling price herein mentioned, for his services in procuring this contract rendering the overplus to the vendor."

There is no dispute but what the contract was signed by the parties and turned over to one John L. Stanton, Jr., a member of the firm of Stanton & Son, who put it in the files of that firm; nor is it disputed that earnest money was deposited with Stanton & Son, in accordance with the terms of the contract.

It is, and was, the contention of appellant that the contract was not binding on account of a want of delivery, and for the purpose of sustaining this defense he offered in evidence testimony to the effect that it was not the intention of the parties that the contract should be binding or should be delivered until certain information had been received. It is a complete answer to this position to say that the manner

of the delivery to be made was expressly stated in the contract, and it is not denied that the contract was turned over to the firm named in the contract. The contention of the appellant, therefore, is, in substance, nothing but this, that although the contract was signed by the parties, and placed in the hands of the firm named by its terms, it was not the intention of the parties that it should operate until one of them had made a further investigation. It thus becomes a very bald attempt by one of the parties to a contract to vary its terms by a parol agreement. A deed may, of course, be deposited in escrow and delivery withheld until the happening of some event agreed upon by the parties, but in the present case, the only delivery intended was made.

Appellant also contends that the court erred in excluding evidence that the appellee refused to take the property on account of the amount of special assessments due. There are two answers to this contention. In the first place, the affidavit of merits did not set up such a defense. The only portion of the affidavit under which appellant claims it was admissible is as follows:

> "Fourth. That the plaintiff has not done and performed everything in said alleged contract contained by him to be performed and has not been ready, willing and able to pay to defendants any balance of the said alleged purchase price therefor, and never tendered to this defendant or either of said defendants any purchase price therefor."

The appellee was not required to do anything or pay anything until certain things had been done by appellant, which it is very clear were never done. The evidence offered was of an anticipatory breach, and was not in any way covered by appellant's affidavit. Appellant made a motion for leave to file an amended affidavit, but abandoned it. The second answer to the contention is that appellee withdrew his objection, and

said, "Let the witness testify. I don't want to take up the time of the court and the jury. I withdraw my objection."

Appellant further contends that the court made improper remarks and comments in the presence of the jury which were prejudicial to the appellant. The discussion in the presence of the jury was with reference to the admission of certain evidence which this court holds was properly excluded. We do not see how this could have prejudiced appellant's case.

The objection that the court in its instructions failed to limit the jury to the claim set forth in the declaration and to confine the jury to the evidence, is not well taken. The issue was plainly and clearly pointed out in the instructions, which were declared to be a series, and the instructions expressly confined the jury to what they found from the evidence.

We are likewise unable to sustain the contention that the presiding judge was without lawful authority to preside at this trial. It appears that the trial judge was judge of the County Court of Douglas County, Illinois, and the Municipal Court Act expressly provides that judges of the Municipal Court may interchange with any other City court judges and with county judges, and said respective judges may hold court for each other and perform each other's duties when they find it necessary or convenient. The right of a county judge to sit in the Municipal Court when requested has been expressly upheld by our Supreme Court. (See American Badge Co. v. Improvement Association, 248 Ill. 589.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

505 - 21901.

SAMUEL BARNETT,
Appellee,

vs.

JACOB FEDER, et al.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 384

MR. JUSTICE GOODWIN delivered the opinion of the court.

This is a separate appeal prosecuted by appellant from the judgment reviewed in Barnett v. Stanton, et al., No. 21892. For the reasons there stated, the judgment is affirmed.

AFFIRMED.

2747

435 - 21434

ELIZABETH STANTON,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

385

205 I.A. 4

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the Chicago City Railway Company, appellant, (hereinafter designated defendant) from a judgment of $6700.00 recovered by Elizabeth Stanton, appellee, (hereinafter designated plaintiff) in a suit for personal injuries alleged to have been sustained through the negligence of the defendant. The declaration contained only one count, and it was alleged therein that on December 15, 1910, the defendant as a common carrier, stopped one of its south bound street cars at the intersection of 47th and Halsted streets, to receive passengers; that the plaintiff desiring to become a passenger upon said car promptly attempted to board said car while it was so standing; that she stepped upon the lower step of said car and partially upon the platform of the same; and that thereupon before she was able to get securely upon the platform of the car, the defendant negligently started said car forward, without notice or warning to her, and with unusual force and violence, so that she was thereby thrown upon the ground and injured.

There have now been two trials in this case, the

first of which took place in January, 1915. On the first trial the plaintiff recovered a judgment for $6500.00, which was reversed by the Appellate Court on October 6, 1914, (188 Ill. App. 502).

The plaintiff was a dressmaker, 42 years old at the time of the second trial and unmarried. Since she was seventeen years old she had worked chiefly as a dressmaker, and for about three months just prior to the date of the accident she had been working at a dressmaking place at 47th and Langley avenue, about a mile and a half east of Halsted street. She lived at 5149 Emerald avenue. Her usual way of going home was to ride west on 47th street from Langley avenue to Halsted street, and then to transfer and go south on Halsted street to 52nd street. After quitting work at about 5:30 P.M., December 15, 1910, she and a Mrs. Meyer rode west on a 47th street car to Halsted street. They got transfers and then crossed over to the northwest corner of the intersection and waited for a south bound Halsted street car. The intersection of Halsted street and 47th street is an important junction, and quite a number of persons were there at the time waiting to take the street cars. Centre avenue cars went south on Halsted street as far as 47th street and there turned west and ran on 47th street to Centre avenue, where they turn south. Some Halsted street cars went south as far as 63rd street and others ran as far south as 79th street. Some Halsted street cars ran south as far as 69th street and some as far as 79th street. The plaintiff desired to go as far as 52nd street and Mrs. Meyer to 60th street. After plaintiff and Mrs. Meyer reached the northwest corner, and after a number

of south bound cars had gone by, a south bound Halsted street car came up and stopped a little north of the north line of 47th street, so that its front trucks cleared the switch leading around to 47th street. It was a double truck, pay-as-you-enter car, with a large rear platform, partitioned off in the manner that pay-as-you-enter cars are usually partitioned. The car, including the platform, was crowded. Quite a number of persons boarded the car as it stood there, ahead of the plaintiff. The plaintiff followed the other entering passengers. The plaintiff took hold of the bar in the center of the platform with her right hand and stepped up, placing her right foot on the step and her left foot on the platform. The lower step of the car was 14 inches above the ground; the platform was 13 inches above the step; so that the platform was 27 inches above the ground. When the car started Mrs. Meyer had not touched the car; she remained on the ground with many other persons apparently waiting for cars.

On behalf of the plaintiff, it is claimed that the car started forward suddenly with a jerk or sudden start, and she was jolted back against a passenger who had hold of the back bar; that she then swung around back; that her "left foot came off the platform;" that her "right foot seemed to grind off the step;" that "her right foot kind of got away"; that she involuntarily fell on her back on the pavement. On behalf of the plaintiff, the only witnesses called who testified as to the actual occurrence were herself and Mrs. Meyer.

On the part of the defendant, it is claimed that the plaintiff "fell by reason of her attempting to step off backwards from the moving car as soon as she discovered that the car was starting without taking her companion aboard;"

that the sole cause of the accident was plaintiff's voluntary act in stepping from the car in such a manner that she lost her balance by getting off backwards. The witnesses for the defendant denied that there was any unusual jerk or lurch in connection with the starting of the car, and denied that the plaintiff was swung around in any manner. On behalf of the defendant, six witnesses were called and testified to the occurrence. The conductor of the car had died before the first trial. The motorman and the witnesses, Ryan, Proctor and McNamee, testified that the car started without any unusual suddenness or jerk. The witnesses, Proctor, Dupil and Ryan, testified that the conductor before starting the car called out a warning of some kind as to the car being about to start. The witnesses, McNamee, Dupil and McGuire, testified, substantially, that the plaintiff after the car started in motion voluntarily stepped off. The witnesses, McNamee, McGuire and Proctor, testified that Mrs. Meyer or some one called out to her (the plaintiff) just before she fell or went off the car.

The plaintiff fell with her head to the south and her feet north, striking first on the back of her head, which was protected by her hair and turban hat. When she got on her feet and was asked if she was hurt, she said her head hurt her. The gripman testified that immediately after the accident he went back and asked the conductor, in the plaintiff's presence, what the matter was, and that the conductor said, in plaintiff's presence, without any dissent from her, "this lady got on the car and after the car had started somebody called her and she stepped off and fell." Plaintiff boarded a following street car and rode to 52nd street, and from there walked home with a young woman she knew and whom she met on the car.

The plaintiff testified that for a while afterwards her head and back were sore and ached and that there was a bump on the back of her head from the fall, which bothered her for a few days; that her back kept getting worse so that she could not attempt to do anything; that for a day or two after the accident her back was reddish; that between February 10th and 15th, some time afterwards, she noticed some protrusion or swelling in her back just below the waist line. The plaintiff did not call or consult a physician for about two months after the accident. On February 17, 1911, the plaintiff went to the office of Dr. John B. Murphy, who introduced her to Dr. John F. Golden. The latter did not make an examination of plaintiff at that time, but did so some weeks later. In the meantime, she was taking some prescription that the doctor had prescribed. Between the 10th and 20th of April, the plaintiff went to the Mercy Hospital and was examined by Dr. Golden, and on the same day there was applied to her a plaster of paris cast which reached from her shoulder down to her hips, encasing her body. The cast remained on for three months. After leaving the hospital she went home and then saw Dr. Golden at his office about every ten days or two weeks, at which times he would examine the cast and see how she was getting along. He gave her a liquid medicine that she took after each meal. Dr. Golden suspected that there was a condition of spondylitis, an imflammation of the spine, and later diagnosed her trouble as tuberculosis of the spine, sometimes called Potts' disease "at the junction of the lower dorsal and the lumbar vertebrae." The part of plaintiff's spine which Dr. Golden claimed was affected with Potts' disease was below the waist line. Dr. Golden testified that at the point

where the suspected disease was located there was some discoloration which might be the remains of the bruise.

In August, 1911, after the plaster of paris cast had been removed, Dr. Golden began administering hypodermic injections of tuberculin to discover whether or not the plaintiff was tubercular and for the treatment of that disease; and several months after the plaster cast had been removed, Dr. Golden fitted to the plaintiff's body a leather jacket or corset which she wore, during the day time and removed at night, for several years.

According to the testimony of Dr. Golden, several months after the accident he concluded that there was a tubercular infection localized in plaintiff's spine; that his treatment eliminated the tubercular condition so that at the time of the trial the plaintiff's spine was not afflicted with any acute disease.

On the first trial, by agreement of the parties, the court appointed Dr. John Ridlon to make an examination of plaintiff. He testified on the first and also on the second trial, that there was no objective evidence of Potts' disease or of any kind of spondylitis; that the plaintiff complained of some tenderness.

On the second trial, Doctors Murdock and Price, who had examined plaintiff at the request of her attorney, testified that the only objective evidence they found was the slight spinal curvature, which they admitted might be caused by many other things than spondylitis. It was claimed for the plaintiff that when tuberculosis germs attack the bones the lower resistance of the bones must be due to traumatism, direct or

indirect. Dr. Ridlon testified that no traumatism was necessary to enable tuberculosis germs to attack the bones; that very few cases of Potts' disease ever had any history of injury.

It is claimed by the defendant that there was no expert testimony that the injuries sustained by the plaintiff as a result of the accident, having in mind the plaintiff's physical history, were capable of producing spondylitis, and that there was, therefore, a failure to prove a causal connection between the injury and the subsequent condition. The evidence of the doctors in making a diagnosis of the plaintiff's condition, was conflicting; Dr. Golden testifying that the trouble in the back was due to tubercular spondylitis or Potts' disease, and Dr. Ridlon testifying that there was no objective evidence of any injury to or disease in plaintiff's back.

In the course of the second trial, Dr. Patrick Murphy testified that the plaintiff went to his office before the time of the first trial; that she was then suffering from pain in the back at about the level of the first lumbar vertebra; that she went to see him several times about it and that he gave her some medicine; that he saw her a week afterwards and she tole him that she had the same trouble with her back; that at the time of the second trial she calle upon him and requested him to refrain from telling anybody that he had ever treated her for any disease of her back.

Prior to this, the plaintiff had testified that she had never had any trouble with her back and never went before December 15, 1912 to any doctors on account of her back. She testified, however, that she had called upon Dr.

Patrick Murphy during the time of the first trial. She also testified that she had never seen Dr. Murphy since the time when he had treated her, two or three weeks before the street car accident.

The case was tried in January, 1913. The jury found defendant guilty and assessed the plaintiff's damages at the sum of $6700.00. The court overruled the defendant's motions for new trial and in arrest of judgment, and entered judgment on the verdict.

On this appeal, the defendant contends:

First: That on the issue of liability, the judgment is contrary to the law and the evidence.

Second: That on the issue of damages the amount of damages is grossly excessive.

Third: That the court erred in rulings on certain instructions.

It is impossible to consider the evidence as to the alleged negligence without being very strongly impressed by the testimony of the witnesses for the defendant. That testimony suggests with striking consistency of observation that after the car started and while it was in motion, the plaintiff voluntarily undertook to step off and was injured. It also suggests as a plausible reason for her conduct, that after getting on and immediately after the car started, she discovered that her friend, Mrs. Meyer, had not gotten on. Yet, in the face of such testimony, we are bound to consider what evidence, if any, supports the contention of the plaintiff, and upon doing so, we find, at least the positive

evidence of the plaintiff and Mrs. Meyer. If we were free to pass judgment on the question of liability, without reference to what the two juries had done, we might easily exculpate the defendant. But, considering the law as to the scope of this court of review, and which must be applied in such a case as this, and having in mind that this case has been tried twice; that the witnesses produced at each trial were practicaly the same; that the two juries had far better opportunities than we have to determine which witnesses were entitled to credence; that both juries found the defendant liable, and that such a finding cannot be said to be manifestly against the weight of the evidence, we are compelled to the conclusion that upon the record as it stands, we are not justified in setting aside the verdict of the jury. As Mr. Presiding Justice Adams said in Burup v. Chicago Consolidated Traction Company, 146 Ill. App. 436: "Two juries have found for the plaintiff, and the trial court refused in each instance to set aside the verdict. This indicates the improbability of a different result should another trial be awarded."

On the subject of damages, it is claimed by the defendant that a verdict of $6700.00 is excessive. That amount is $200.00 more than the amount awarded on the first trial. The Appellate Court, in reversing the former judgment in this case, announced that the verdict, which was for $6500.00, was excessive. The testimony of the medical experts is, of course, irreconcilable. Obviously the science of medicine is not yet sufficiently developed to enable its professors to determine with certainty and positively either the cause or the extent of the abnormal physical condition, if any, of the plaintiff in this case. What

influence the evidence of the medical experts in this case had in bringing about the verdict that was rendered, it is impossible to say. Whether or not the plaintiff was affected with Potts' disease, or with any kind of spondylitis, or if affected with Potts' disease, it was caused by traumatism, and if caused by traumatism, it was direct or indirect, it is a safe conjecture, the jury did not decide. From such evidence as was offered in this case, as to the cause and nature of the plaintiff's injury, it is a fair inference that the jury considered only that which seemed to prove some disturbance of the general normal health of the plaintiff's organism, and as due to the defendant's negligence and consequent fall. Of course, it is impossible for any body of man, jurors or judges, in such a case as this, to measure any more than by vague approximate standards, the extent of the injury suffered by the plaintiff. Some considerable emphasis is laid by the defendant upon the fact that Dr. Patrick Murphy testified that the plaintiff visited him prior to the time of the accident, and complained of trouble with her back. The plaintiff undertook to explain the matter by admitting that she did visit the doctor at that time, but only for the purpose of being treated for some stomach trouble. The testimony, however, of the plaintiff, Dr. Murphy, Dr. Eggert and Griffin, on that subject, is too conflicting to be of much importance. Whom the jury believed on that subject, or whether they paid any attention to it, we do not know. Of course, according to the law, as we all know, the jury is the tribunal created to pass upon the subject of injury and damages. In this case, two juries have considered substantially similar evidence, and they have rendered approximately equivalent

verdicts. It is true that the Appelate Court said that the first verdict was excessive, but in the second trial, the evidence as to the extent of the injury, was perhaps somewhat stronger than in the first trial.

It is claimed by the defendant, that the court erred in refusing the defendant's instruction #5, which was as follows:

> "You are instructed that there is no charge or claim made, nor can there be any liability attached to the defendant railway company because of the fact, if you believe from the evidence it is a fact, that the car in question did not wait for or give the plaintiff's companion, who was with her, time or opportunity to board the car in question."

The evidence shows that the car started without taking on board the plaintiff's companion, Mrs. Meyer, and many other persons who were left waiting on the street. We do not think we are justified in concluding that the jury gave any significance to the fact that the car did not wait to take on more people. The declaration simply charged negligence in starting the car, and the jury were instructed that recovery could only be had on account of the negligence charged in the declaration.

It is also claimed by the defendant that the court erred in giving the following instruction on behalf of the plaintiff:

> "The court instructs the jury that it is the duty of a common carrier to its passengers to do all that human care, vigilance and foresight can reasonably do, under the circumstances and in view of the character and mode of conveyance adopted, and consistently with the practical operation of its road, and the conduct of its business as a common carrier, reasonably to guard against accidents and consequential injuries, and if it neglects to do so, it is to

be held strictly responsible for the consequences which directly flow from such neglect, if the passenger is, before and at the time of the injury, in the exercise of ordinary care for his or her own safety; while a common carrier is not an insurer of the absolute safety of its passengers, it does, however, in legal contemplation, undertake to exercise the highest degree of practicable care to secure the safety of its passengers, and is responsible for any failure to exercise such care directly resulting in injury to the passenger, if the passenger is, before and at the time of the injury, exercising ordinary care for his or her own safety; provided, that such neglect, if any, upon the part of the carrier, and such care, if any, upon the part of the passenger, are alleged in the declaration and established by a preponderance of the evidence."

It is claimed on behalf of the defendant that this instruction is misleading as applied to the questions in issue in the case at bar; that it undertakes to cover the whole range of a carrier's duty. A similar instruction was approved in C. C. Ry. Co. v. Schreve, 226 Ill. 530. It is stated by counsel for the defendant that the facts and the questions there involved, were quite different. The instruction here in question is certainly very broad, but its scope is determined by the words "it does, * * * undertake to exercise the highest degree of practicable care to secure the safety of its passengers," and the words "provided, that such neglect, if any, on the part of the carrier, and such care, if any, upon the part of the passenger, are alleged in the declaration" etc. Considering all the instructions that were given, it is difficult to see any basis for the claim that the jury might have concluded that they were warranted in basing their verdict upon any ground of negligence except that charged in the declaration.

It is contended on behalf of the defendant, that the court erred in giving plaintiff's instruction #10, which

was as follows:

> "The court instructs the jury that when it is said in these instructions that the plaintiff was required to exercise ordinary care for her own safety, it is meant that she was required to exercise that degree of care which an ordinarily prudent person, situated as she was, both before and at the time of the injury, would have exercised for his or her own safety."

We cannot so belittle the comprehension and judgment of the jury, as to assume, as the defendant suggests, that the foregoing instruction may have led them to think that the plaintiff, if she undertook voluntarily to step off the car while it was in motion, was in the exercise of ordinary care.

Counsel for the defendant states "Courts are reluctant to reverse a judgment which follows two verdicts the same way." On the other hand, we are reluctant on the evidence in this record, to affirm the judgment. However, after a careful consideration of the evidence, the instructions, and the history of the two trials, as presented to us by the record, we are compelled to the conclusion that the judgment should be affirmed.

AFFIRMED.

was as follows:

"The court instructs the jury that when it is made to appear from the evidence that the plaintiff was required to exercise extraordinary care for her own safety, it is always also and not limited to exercise such degree of care which an ordinary prudent person, situated as she was, being before and at the time of the injury, would have exercised for him or her own safety."

We cannot in justice the misrepresentation and

judgment of the jury, as in reason, as the defendant

emphasis, that the foregoing instruction may have led

them to think that the plaintiff, if the undertook

actionarily to stop all the car while it was in motion,

was in the exercise of ordinary care.

Counsel for the defendant states "Courts are too

inclined to reverse a judgment which relieve the verdicts

the same way." On the other hand, we are reluctant to

the evidence in the record, to affirm the judgment.

However, after a careful consideration of the evidence,

the instructions, and the strength of the two briefs, we

presented to us by the record, we are compelled to the

conclusion that the judgment should be affirmed.

AFFIRMED.

452 - 21850

GEORGE TRUMBULL WOODBURY,

Appellant,

vs.

UNITED STATES CASUALTY COMPANY, a corporation,

Appellee.

Appeal from

Circuit Court

Cook County.

205 I.A. 404

MR. JUSTICE TAYLOR delivered the opinion of the court.

Inasmuch as this appeal involves substantially similar matters to those adjudicated in Woodbury v. Ocean Accident & Guarantee Corporation, Ltd., (Gen. No. 21800), we are of the opinion that the court erred in directing a verdict for the appellee, and for that error so committed, the judgment ought to be reversed and the cause remanded.

REVERSED AND REMANDED.

Filed April 18, 1917

436 - 21834

ALABAMA MARBLE COMPANY,
(Plaintiff),
Appellee,

vs.

H. L. STEVENS (Defendant),
Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

205 I.A. 405

MR. JUSTICE TAYLOR delivered the opinion of the court.

This record presents for review a judgment entered in the Municipal Court in favor of the plaintiff (appellee), on the allegations and admissions in the pleadings, and without the introduction of any affirmative evidence. The pleadings consisted of a statement of claim by the plaintiff and an affidavit of merits by the defendant. The plaintiff's statement of claim alleged the rendering of certain services and the furnishing of certain material, under a written contract, a copy of which was filed with the statement of claim. The statement of account set forth in the statement of claim recites, among other things, "to balance owing this date $1614.91." The copy of the instrument sued on by the plaintiff is an agreement made on July 2, 1909, between the plaintiff and the defendant, by which the plaintiff agrees to furnish and erect all of the marble required in the erection of a theatre and office building, for the sum of [illegible], "to be paid by the party of the second part as hereinafter provided." The ninth paragraph of the written contract is as follows:

"FIFTH: It is further agreed that the sum of Four Thousand Two Hundred and Fifty Dollars, mentioned in paragraph two hereof, shall be paid in installments every thirty days on the 15th day of each month as the work progresses, according to the work and material which has gone into the building, to be estimated by the architect's superintendent, less fifteen per cent, to be held back until the final completion and acceptance of all the building, the work to be estimated on the first of each month for work of past month and paid on the 15th day of same month, and the party of the first part, as a condition precedent, is to give satisfactory bond in the sum of.....Dollars, conditioned upon the faithful performance of the covenants of this agreement. It is further distinctly understood and agreed between the parties hereto that no money shall be due and payable on this account until the party of the second part has received such money so due, from the owner of the building."

The affidavit of merits of the defendant recites that he has a good defense to the suit upon the merits to the whole of the plaintiff's demand, and

"That the work and services rendered and the materials and extras furnished as set forth in plaintiff's amended statement of claim were rendered and furnished in connection with the erection of a certain theatre and office building in Atlanta, Georgia; that said work and services were rendered, and that the said materials and extras were furnished in accordance with a written contract made and entered into by and between the plaintiff and the defendant on behalf of the owner of the aforesaid theatre and office building; that before and at the time said contract was made and executed it was known, agreed and understood between the plaintiff and defendant that same was made and executed by the defendant in behalf of the owner of said building.

Further answering, this defendant states that by the terms of the aforesaid contract it was distinctly understood and agreed between the parties thereto that no money should be due and payable to the plaintiff from the defendant until the defendant herein had received such money so due from the owner of the said building.

And this defendant, further answering, states that no money so due has been received from the owner of the said building, and in accordance with the terms of the contract this defendant is not indebted to the plaintiff in any such sum whatsoever."

In the trial court, the case having been called for trial and a jury having been waived, the plaintiff, offering nothing more, moved the court to rule that the plaintiff's statement of claim was sufficient in law and that the burden of going forward with the evidence was on the defendant. The court allowed the motion and ruled that the burden of going forward with the evidence was upon the defendant. After certain propositions of law had been submitted to the court by the defendant, and refused, plaintiff moved the court for a finding on the pleadings and a judgment on the finding. The court allowed the motion, found the issues in favor of the plaintiff and entered judgment in favor of the plaintiff in the sum of $1614.91 and costs.

It is contended by the defendant; (1) that the entry of the judgment was erroneous because the defendant had on file a sufficient affidavit of merits and was not in default; (2) that the plaintiff's statement of claim failed to show a compliance with the provisions of the contract in suit, or that the balance claimed was due when the suit was brought; (3) that it was incumbent on plaintiff to show that the money had been collected from the owner, or that the defendant had been negligent in failing to collect it; (4) that, if the premises was to pay within a reasonable time, if the defendant did not get the money from the owner of the building, plaintiff should have proven what was a reasonable time.

Inasmuch as the plaintiff relied upon his statement of claim as a cause of action, and the defendant relied upon his affidavit of merits as a defense, and neither party saw fit to introduce any evidence, the critical question in the case is whether (1) the statement of claim, assisted by the admissions in the affidavit of merits, states a cause of action no material part of which is sufficiently denied by allegations in the affidavit of merits.

The statement of claim alleges that the "balance owing" for work and material is $1614.83. It also states, considering the written contract as part of the statement of claim that it was distinctly understood and agreed * * * that no money shall be due and payable on this account until the party of the second part (the defendant) has received such money so due from the owner of the building."

The affidavit of merits admits that the work and materials were furnished in accordance with the written contract but avers that the plaintiff knew that the contract was made and executed by the defendant "in behalf of the owner of said building;" also that by the terms of the written contract it was distinctly understood and agreed that "no money shall be due and payable to the plaintiff * * * until the defendant herein had received such money so due from the owner of said building;" that no money so due has been received from the owner of said building, and in accordance with the terms of the contract this defendant is not indebted to the plaintiff in any such sum whatsoever."

The claim of the plaintiff is that as the price of $4250.00, provided for in paragraph two of the written contract, and the payment of which is provided for in the first part of paragraph nine, are antecedent to the statement in the written contract that no money shall be due and payable until it has been received from the owner of the building, it is not part of plaintiff's case to plead or prove that the defendant has received any such money from the owner of the building.

In interpreting the contract in question to determine the mutual obligations of the parties thereto, it is necessary toconsider the whole of the contents of the instrument. There is no doubt but that the ninth paragraph is as much a part of the contract as the second, and the latter part of the ninth paragraph is as binding as the first part. Considering the second paragraph and the ninth paragraph of the contract in question, which paragraphs provide for the payment of $4250.00, and the source from which it shall come, there is found a promise on the part of the defendant to pay out of a specific fund a certain sum. The agreement "that no money shall be due" until the defendant has received it from the owner of the building, is not a qualification or exception, but an inherent part of the liability. The right of the plaintiff to compensation was not complete by merely furnishing the work and material. Before anything was due plaintiff, and, in other words, before he was entitled to sue, it was also necessary that the defendant had received the "money so due from the owner of the building." It is true that the plain-

tiff's statement of claim recites the "balance owing," but it also recites the contents of the written contract and makes them part of its statement of claim; and that, taken in conjunction with the defendant's affidavit of merits, which states "that no money so due has been received from the owner of the said building" it follows, as an inference that the defendant is not indebted to the plaintiff in any sum whatsoever. Upon the face of the pleadings, therefore, plaintiff has stated a cause of action, a material part of which, (having reference to the latter part of paragraph nine of the statement of claim) is traversed by the defendant.

Many cases have been cited by the plaintiff in an endeavor to show that the affidavit of merits really sets up a plea in confession and avoidance, and that therefore the burden of introducing evidence in the trial court was first upon the defendant. It is our opinion, however, that compliance with the agreement that the money should be due and payable after it was received by the defendant from the owner of the building, was a prerequisite to liability on the part of the defendant. The defence set up is not in the nature of a confession and avoidance, but a direct express traverse or denial of the existence of one of the necessary elements in the plaintiff's alleged cause of action. If it should be claimed that the agreement "to balance owing this date" implies that the defendant has been paid by the owner of the building, the denial by the defendant in his affidavit of merits "that no money so due has been received from the owner of said building"

is a sufficient traverse and leaves the burden of introducing evidence still upon the plaintiff.

The plaintiff has undertaken to explain away the case of Fairbank et al v. Dalzell, 46 Ill. App. 644, but the agreement in that case "to pay the sum of $2250.00, to be paid out of sales of the stock of the Dalzell Electric Co., of Keokuk, to be disposed of as quickly as possible" was a promise to pay, just as in the case at bar; one of the elements of which was that payment was to be made only out of a certain fund. The language in the Fairbanks case (supra) does not seem to be any stronger or more explicit than the words, "it is further distinctly understood and agreed," which are the words in the present case. In the Fairbanks case, the court said: "The true construction of the written contract was that the indebtedness should be paid out of sales of the stock * * * to be sold as soon as possible. The burden was upon plaintiffs to show that a sale of the stock had been made, or that one was unreasonably delayed."

In the instant case, therefore, the burden was upon the plaintiff to show that the defendant had received money from the owner of the building, or that the defendant had been guilty of some unreasonable conduct in regard thereto. We are of the opinion that upon the pleadings as they stood, the burden of proof and of introducing evidence was upon the plaintiff, and that the trial judge erred in ruling otherwise and entering judgment for the plaintiff.

REVERSED AND REMANDED.

592 - 21990

PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN D. KAVANAUGH,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 406

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a petition, for a writ of mandamus, filed by John D. Kavanaugh, in the Circuit Court of Cook County, against the City of Chicago, for the purpose of having his name restored to the roster of lieutenants of the fire department, from which it was dropped on May 4, 1906. The original petition was filed on January 15, 1915, and was amended on February 27, 1915. On January 21, 1915, the City of Chicago filed a general demurrer to the petition. On February 27, 1915, the trial court overruled the demurrer, and on March 5, 1915, entered an order that a peremptory writ of mandamus issue placing the name of the relator upon the roster of lieutenants of the fire department and upon the fire department pay-roll of the City of Chicago, "with the same right to continue in the performance thereof and receive salary therefor, as he had to continue in the performance thereof and receive salary therefor prior to his unlawful removal on May 4, 1906."

Upon this appeal, it is contended by the respondent, (City of Chicago) that as the petitioner delayed more than six months in filing the petition for reinstate-

ment, without showing any excuse for such delay, he was guilty of gross laches, and by reason thereof his petition should have been dismissed.

The petitioner was discharged on May 4, 1906, and filed his petition on January 15, 1915, over eight years afterwards.

So much time has elapsed that there seems to be no escape from the laches imputable to the relator.

In Clark v. City of Chicago, 233 Ill. 113, the court says:

> "The petition for the writ in this case was filed ten months after the petitioner had been removed from office, and as the petitioner makes no showing why said petition was not filed at an earlier date, and within six months of the date of the entry of the order of removal by the Civil Service Commissioners, we think the appellee should be held to be barred by reason of his laches, of his right to have said order reviewed."

It would certainly lead to confusion and disorder, and would not promote substantial justice to allow such an action after the lapse of more than eight years. We are of the opinion that as the relator failed to state in his petition any facts tending to excuse the delay, the principle of laches, which is invoked by the demurrer, is a complete bar to relief. People ex rel King v. City of Chicago, 147 Ill. App. 591; Clark v. City of Chicago, 233 Ill. 113; People v. City of Chicago, 148 Ill. App. 96; Schultheis v. City of Chicago, 240 Ill. 167.

We are of the opinion that the trial court erred in overruling the demurrer to appellee's petition for a writ of mandamus. The judgment is therefore reversed,

petition clearly have been eliminated.

The petitioner was discharged on May 4, 1938, and filed his petition in January 19, 1939, over eight years afterwards.

It would certainly lead to confusion and disorder, and would prevent substantial justice to allow such an action after the lapse of more than eight years.

We are of the opinion that the trial court's order in this matter should be affirmed.

It is so ordered.

Judgment affirmed.

Jones, Ch. J., and Wilson, J., concur.

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1. Compare Ex Parte Allen, 87 Miss. 147, 39 So. 661; Ex Parte Allen, 87 Miss. 149, 39 So. 662; Ex Parte Allen, 87 Miss. 151, 39 So. 662; Ex Parte Allen, 87 Miss. 153, 39 So. 662; Ex Parte Allen, 87 Miss. 155, 39 So. 662; Ex Parte Allen, 87 Miss.

and as the relator is not entitled to the writ, the cause is remanded to the court with directions to enter an order sustaining the demurrer of respondent and dismissing the petition of relator.

REVERSED AND REMANDED WITH DIRECTIONS.

and as the latter is not entitled to the work, the means
is connected to the power with directions to enjoy on strict
restricting the country of enjoyment and eliminating the
position of rights.

BALANCING AND MANAGING RISK EXPOSITION.

23364

ISADORE B. STORE,
Appellee,

vs.

JANETTE MANUFACTURING CO. et al.,
Appellants.

Interlocutory Appeal
From Superior Court,
Cook County.

205 I.A. 407

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order denying a motion to dissolve an injunction.

Counsel for the appellee heretofore made a motion to dismiss the appeal, which we have denied. As the larger part of his brief filed in this appeal is taken up with argument and citations tending to support his motion for dismissal, we shall here briefly give our reasons for denying that motion. Counsel has cited Zahnle v. Crosscup, 132 Ill. App. 383, opinion by Mr. Presiding Justice Dibell, in which several cases are cited where the appellate courts of this state have held that no appeal will lie from an order denying a motion to dissolve an injunction. From these opinions it appears that the reason for so holding was that the act of July 1, 1887, permitting interlocutory appeals, in force at that time, was entitled "an act to provide for appeals from interlocutory orders granting injunctions and appointing receivers"; and it was held in these cases that this title did not embrace appeals from orders denying a motion to dissolve. That reason no longer obtains, for the act, section 123 of the Practice Act, was re-enacted in 1907, as part of the general Practice Act whose title is "an act in relation to practice and procedure in courts of record"; there is no special title for section 123. Such an appeal as this is

allowed under the terms of the statute and is embraced in the general title of the Practice Act. See Craig v. Craig, 246 Ill. 449.

We see no reason to reverse the order of the chancellor. The bill was filed by a minority stockholder and charges the other stockholders with a conspiracy and combination to deprive him of his interest in the corporation and to destroy the value of his stock so as to compel him to sell the same at a loss; that on a certain day the appellants adopted a resolution authorizing the issuance of $15,000 of treasury stock, and to sell the same at par value if they saw fit; it was also asserted that said stock would be sold to appellants and others at par, which would increase the capital stock of said corporation from $10,000 to $25,000, and that the stock of the appellee, which was worth approximately $500 per share, would be reduced to about $250, so that his voting power would be totally destroyed. It was alleged that there was no necessity for the sale of treasury stock, as the corporation was not in need of money, and that appellants did not intend to pay for the stock, their only purpose being to carry out the conspiracy to injure the value of appellee's stock and lessen his voting power. Upon the bill, supported by affidavit, the chancellor issued a temporary injunction restraining the sale or disposition of the treasury stock of the defendant corporation until further order of the court and subsequently denied a motion to dissolve. We think this was within the sound discretion of the chancellor, and we are not disposed to reverse. We should not be understood as indicating what disposition should be made of this controversy upon final hearing.

AFFIRMED.

440 - 22874

F. J. RILEY PRINTING CO.,
a corporation,
Appellee,

vs.

THE BISSELL LAUNDRY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

205 I.A. 409

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for an indebtedness under a contract for advertising of defendant's business in a publication called "The Hamiltonian," of which plaintiff was the publisher. Upon trial there was a verdict and judgment, but we are not informed by the abstract as to the character of either; the recital in the abstract is, "Verdict and motion for new trial. Order denying motion for new trial and judgment." The abstract is the pleading of the parties in this court, and if it fails to inform us as to what the judgment was which we are asked to reverse we will assume it to be correct, and affirm.

The defense asserted by the affidavit of merits was that the defendant did not know plaintiff was the publisher of "The Hamiltonian" but thought it was contracting for advertising in this journal with the Hamilton Club of Chicago. The contract, which is in writing, does not pupport to be with the Hamilton Club of Chicago, and from the evidence the jury could properly find that there was no misrepresentation when the contract was made. The advertising was printed according to contract, and defendant cannot avoid paying for the same by now claiming that it executed

203 17. 109

the contract under the impression that the money was to be paid for the benefit of a party not named in the contract.

The plaintiff, as the publisher of the periodical in which the advertisement appeared, is entitled to the compensation named in the contract, and the judgment is affirmed.

AFFIRMED.

443 - 22877

MAUDE E. FOY,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 410

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck and injured by one of defendant's street cars; she brought suit and had a verdict and judgment for $5,000 from which the defendant appeals.

There is no dispute as to the general facts. The accident happened about eight o'clock on the evening of April 2, 1914, at the crossing of 63rd street and St. Louis avenue in Chicago. 63rd street runs east and west and has on it two street car tracks; St. Louis avenue runs north and south, and the next street west is Central Park avenue, which is the western terminus of the street car line. There was a cross-over at that point, running from the north track on 63rd street southeasterly to the south track. The car in question reached Central Park avenue on its last trip for the day, and there stopped and prepared to go to the barn; the electric sign above the window was changed so as to read "Depot," and the car started on the cross-over to proceed eastward on the eastbound track. At the southwest corner of St. Louis avenue there were cinders for people to stand on while waiting for cars; it was customary for eastbound cars to stop at this point to permit passengers to alight and go aboard, and defendant's' rules required cars going to the depot, as well as other cars, to stop at this crossing for passengers.

Plaintiff was then about 33 years of age; she had been in a drug store at the southeast corner of St.Louis avenue and 63rd street, in the company of Mrs. Barber, a neighbor. Coming out of the drug store they walked west across St. Louis avenue on the south cross-walk, to the southwest corner; at this time there were four or five people standing on the cinders referred to, at a point about a car length west of St. Louis avenue, waiting for an eastbound car. While crossing St. Louis avenue plaintiff saw this car at Central Park avenue and that it was lighted in the usual and ordinary way. She and Mrs. Barber also saw the people waiting for the car, and supposed the car was going to stop at this place for these people to board it. Under this belief they stepped off the sidewalk and started to cross 63rd street to the north on the cross-walk. At this time the car was about 200 feet away, as she said, and approaching. The two women continued to cross the track. There was an arc light on the corner, and nothing to prevent the motorman from seeing either the people waiting for the car or the plaintiff and Mrs. Barber crossing the street. Instead of stopping, the car came on at a rate of speed of 18 to 20 miles an hour, and the jury properly could believe that no bell was rung or any warning of any kind given to indicate that the car was not going to stop at that place for the waiting passengers. Both plaintiff and Mrs. Barber were struck by the car. The car was traveling so fast that it ran clear across St. Louis avenue before it was stopped. Plaintiff was thrown about half way across St. Louis avenue onto the westbound track.

That defendant was guilty of the negligence charged in the declaration was abundantly proven, and defendant in this court does not argue to the contrary.

Was the plaintiff guilty of contributory negligence? Under the circumstances plaintiff had every reason to believe that the car would stop before it reached St. Louis avenue; there is no evidence that she knew the car was headed for the barn, but even if she did, she also knew that it was customary for all cars to stop at that corner when passengers were to be taken on. The group of persons standing at the usual point where passengers boarded the car would reasonably lead her to believe that the custom would be observed at this time. No warning of any kind was given to indicate that the car would not make the usual stop. She might have made an error in judgment, but it does not follow that this would amount to negligence. As was said in Wagner v. Chicago & Alton R. R. Co., 265 Ill. 245, "a mistake does not in all cases imply a want of ordinary care." We are not disposed to disagree with the conclusion of the jury that plaintiff, while acting as an ordinarily prudent person would under the circumstances, was misled by the unusual and unexpected course of the street car and started to cross the track in the exercise of ordinary care for her own safety. Among the cases tending to support our conclusion are Savage v. C. & J. Ry. Co., 238 Ill.392; C. C. Ry. Co. v. Sandusky, 198 Ill. 401; C. U. T. Co. v. Jacobson, 217 Ill. 404; C. C. C. & St. L. Ry. Co. v. Baddeley, Admr., 150 Ill. 328; R. & O. S. W. Ry. Co. v. Keck, 185 Ill.400.

Are the damages excessive? Plaintiff was 33 years of age at the time of the accident, the mother of three children; she was knocked more than 30 feet away, and was unconscious when picked up; she was taken to a hospital and remained there 42 days. She testified that she had periodical spells of unconsciousness for two or three days following the accident; she was under a doctor's care all of this time. She received a

fracture of four ribs, injury to her left knee, fracture of one of the bones of the pelvis, and the separation of the sacroiliac joint, and other injuries of a general character. Before the accident she had been in good health and strong, doing her own housework; since the accident she has been in poor health, able to walk but a short distance, slightly lame, and able to do but little of the housework. The defendant introduced no testimony tending to contradict the presence of the injuries. Both counsel have argued with considerable particularity the evidence of the details of plaintiff's injuries, for the most part technical in character. We hold that there is no substantial reason for concluding that the jury returned a verdict for an unwarranted amount. The undisputed injuries were of a serious nature, and the verdict was not for such an amount as to require any change by us.

The points presented by the defendant as to the rulings on the admission of evidence are not of sufficient force to persuade us to a reversal. Errors, if any, in this regard were not of sufficient importance to be prejudicial, and we do not see how, under such evidence as is not questioned, there could have been any other verdict.

Holding as we do, that the jury properly found that plaintiff had proven the charges made in her declaration, and that there were no errors committed upon the trial, the judgment is affirmed.

AFFIRMED.

446 - 22880

JOHN GARRETT,
Appellee,

vs.

ANGLO-AMERICAN PROVISION COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 411

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against it for $6,000, obtained by plaintiff in an action to recover damages for personal injuries.

Plaintiff had been working for defendant for several years as a brick mason, and on June 20, 1912, while so working, a scaffold upon which he and other workmen were standing gave way; plaintiff fell to the ground, receiving the injuries complained of.

Plaintiff filed a declaration in two counts, the first of which charged a wilful violation of the so-called structural or building act (chapter 48 Illinois Statutes, Hurd) in respect to the construction and maintenance of the scaffold in question; whereas the second count charged common law negligence in respect to the construction and maintenance of the scaffold. By amendment it was alleged in each count that the defendant elected not to accept the provisions of the Workmen's Compensation Act. Defendant filed a plea of general issue.

There is no substantial contention that the evidence did not warrant a verdict under either of these counts, the chief contention of defendant being that the plaintiff's right at common law and under the building act was taken away

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by the Workmen's Compensation Act of 1911. We do not agree with this contention. We are inclined to be of the opinion that upon the record before us the defendant is barred from raising this question, as the jury was instructed, "with the consent of both parties," that the "so-called Workmen's Compensation Act has no application to this case." Is the defendant free from the effect of this by the refusal of the court to give a peremptory instruction for the defendant at the close of the evidence?

It is argued that when the court refused to hold that the Compensation Act was applicable, which was involved in the peremptory instruction, this question of law was preserved for review and not waived, even if subsequently, at defendant's request, the court should instruct that the act was not applicable. It is true that after a peremptory instruction has been refused, an exception preserves that question of law for review, and the defendant may proceed to present the facts and the law applicable thereto under the view of the law imposed by the court, without waiving his right to question the correctness of that view; but we are referred to no case holding that a party, after refusal of its request for an affirmative instruction upon its theory of the law, may then ask the court to instruct negatively as to the same theory of the law, without waiving error, if any, upon the prior ruling. Such a practice would tend to encourage a party to request instructions wholly opposed to each other, and allege error upon the refusal of either.

Regardless of the condition of the record, we are of the opinion that the plaintiff in this case was not bound by the Compensation Act, for the reason that the defendant, his employer, did not give or post the necessary statutory notice or statement. The last part of paragraph

"C", section 1 of the Compensation Act, is as follows:

> "Provided, however, that before any such employe shall be bound by the provisions of this act, his employer shall either furnish to such employe personally at the time of his hire, or post in a conspicuous place at the plant or room or place where such employe is to be employed, a legible statement of the compensation provisions of this act."

In the recent case of Curran v. Wells Brothers Company, No. 22722, this court, opinion by Mr. Justice Dever, filed April 16, 1917, we construed this paragraph, with special reference to this proviso. We there said:

> "It is clear that it was the purpose of the legislature not to permit an employer to claim any benefit under the Act in a suit brought by an employe, where he, the employer, had not complied with its provisions. The beneficial purpose of this paragraph was to notify employes that the employer was operating under the Act, and that employes could, if they saw fit to do so, protect their interests by filing a notice with the bureau mentioned, in case such employes should elect not to work under the Act."

Our decision, as expressed in that opinion, was that the statement provided for in the act must be furnished to the employe personally or posted in a conspicuous place, as provided by the statute, and that if this was not done the employer could not claim to be under the act.

We hold that the evidence was ample to prove that the defendant did not comply with this requirement. Many witnesses, who had been employed about the plant of the defendant, testified that no such statements or notices were posted about the place, and this evidence was not denied. Such evidence created no variance with the pleadings; plaintiff's amendments added to the counts averred that the defendant had elected not to come under the provisions of the Compensation Act. Failure to post notices would be entirely consistent with refusal to come under the act. Furthermore, the gist of the amendments is that neither plaintiff nor defendant came under the provisions of the Compensation Act, and any evidence which tended to show no compliance with this

"C", section 1 of the Compensation Act, is as follows:

"Injury" means, [illegible] that before any such weekly
wages can be deemed to be [illegible] at this act, the employee
shall be deemed to have worked [illegible] at the
full time of the firm, or part in a [illegible] plans at the
plant or some at those where such [illegible] is to be em-
ployed, a [illegible] estimate of the [illegible] [illegible]
stance of this act."

In the recent case of Larsen v. White Furniture
Company, Inc. LARSEN, this court, opinion by Mr. Justice Smart,
filed April 14, 1919, we construed this paragraph, with specific
reference to this situation. We there said:

"It is clear that it was the purpose of the
legislature not to permit an employer to claim any rate-
[illegible] under the Act in a part primarily an industry,
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

act would be competent.

Plaintiff attempted upon trial to show by documentary evidence that the defendant had in a formal way rejected the act, but the court ruled out such evidence as incompetent in the manner in which it was offered. While the rulings of the court as to most of this may have been correct, we think the certified copy of the notice dated November 15, 1912, was competent. That notice was to the effect that the defendant elected to come under the Workmen's Compensation Act to commence on November 15, 1912, with a statement that before that time it had carried casualty insurance and had not come under the provisions of the act. It should be remembered that the accident occurred on June 20, 1912, and this notice was filed November 15, 1912. We are inclined to hold that this was an admission that the defendant was not under the act at the time the notice was filed.

There was no error in the refusal of the instructions offered by the defendant to the effect that plaintiff must prove the failure to erect the scaffold in a safe manner beyond a reasonable doubt. These words were stricken from the instruction and in lieu thereof the court inserted the words "a preponderance of the evidence." This is not an action to enforce a penalty, but a civil action to recover compensation for injuries. The rule has been frequently announced in this state that in such actions the plaintiff is required to prove his case by a preponderance of the evidence and not beyond a reasonable doubt. Davis v. Illinois Collieries Co., 232 Ill. 284; Guthrie v. Empire Coal Co., 150 Ill. App. 530; Hall v. Barnes, 82 Ill. 228; Woods v. Dailey, 211 Ill. 495; Robinson v. Randall, 82 Ill. 521; and in 17 Cyc., p. 760, it is said: "In a civil action to recover a statutory

penalty or statutory double or treble damages plaintiff's case is sufficiently proved by a preponderance of evidence, even where the act or omission of defendant constituted a crime, unless the action is criminal in its nature and effect."

It was not error to refuse an instruction that if the plaintiff himself was guilty of violating the building statute the jury should find the defendant not guilty. There was no evidence upon which to base this instruction, as it was shown without contradiction that plaintiff had nothing whatever to do with the erection or construction of the scaffold.

No convincing reasons are presented why the judgment should be reversed, and it is therefore affirmed.

AFFIRMED.

450 - 22884

ANNIE SASEK,
Appellee,

vs.

JOSEPH F. TRISKA, trading as Joseph F. Triska & Co., and JOHN S. JURIK,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 414

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for damages for alleged malicious prosecution, had a verdict and judgment for $500 from which the defendants appeal.

The evidence tends to show that in the spring of the year 1912 the defendant Triska owned certain vacant real estate on Kedzie avenue near 53rd street in Chicago; that he proposed to subidivde and sell the same, and for this purpose formed a partnership with the defendant Jurik, who had an office on the subdivision and was in charge. In the latter part of April, 1912, the defendants planted a considerable number of young Carolina Poplar trees which they had bought from a nursery company. A short time after the trees had been planted on the subdivision, that is, about May 1, 1912, Jurik noticed that 13 of them were missing. On the same day, in a conversation with the mail-carrier in that district, in which Jurik spoke of the missing trees, the mail-carrier said that he had noticed such trees "spring up over night" on the premises of Mrs. Sasek, the plaintiff, a widow, who lived about six blocks from the defendants' subdivision. The mail-carrier also informed Jurik, in substance, that anything stolen around there could be found in plaintiff's yard. Jurik thereupon went to plaintiff's place and found 13 trees planted there which looked like the

Vs.

Defendants.

Plaintiff, pleading mail fraud damages for alleged
motorcycle transaction, and a verdict and judgment for $844
from which the defendants appeal.

The evidence tends to show that in the spring of
the year 1912 the defendant Tribbe owned certain mining land
situate on Pebble avenue near Dry Arroyo in Colorado; that he
purposed to subdivide and sell the same, and for this purpose
formed a partnership with the defendant Jurik, who had an al-
lied or the subdivision and was to charge. In the latter part
of April, 1912, the defendants platted a considerable number
of Young Turnline Duplex Trees which they put upon Pine a
nursery company. A short time after the trees had been placed
on the subdivision, that is, about May 1, 1912, Jurik entered
that it of them were missing. On the same day, in a conversa-
tion with the said-sawler in that vicinity, in which Jurik
stated among these "stands at over eight" on the diameter of tree.
deadwoods' condition. The said-sawler also informed Jurik,
among the plaintiff, a widow, who lived about six miles from the
above of the missing trees, the said-sawler said that it was
in existence, that existing spleen stands there would be found
it Plaintiff's part. Jurik threatened what to plaintiff's

205134, 414

ex. Exercise Duplex Mahogany

Defendant for Opinion of the Court.

Appellants.

Vs.

Appellee.

Error from County.

Walter Rice Chester Judge.

Abbott Brown,

trees taken from the subdivision. Jurik reported this to the defendant Triska, and was told by Triska that he had "better make sure." Jurik thereupon went with the nursery man who had sold the trees, and two police officers, to plaintiff's residence and inspected the trees in her yard. The examination showed that these 13 trees had been freshly planted, and the nursery man positively identified them as being the trees which he had sold to defendants and planted on their subdivision; he indicated peculiar marks of identification, which established it beyond any serious question that the trees found in plaintiff's yard were the trees which had been stolen from defendants' subdivision. They inquired of plaintiff's son, Albert, as to how the trees came to be there, and were informed by Albert Sasek that he had bought the trees from a man who was going by with a wagon; that he had never seen the man before or since, and that he had bought them for 15 cents apiece. The price at which the trees had been sold to defendants was more than a dollar apiece. The police officers then advised the swearing out of a complaint charging the plaintiff with receiving stolen property, and also informed Jurik that the Sasek family was a family of bad reputation. Jurik reported these things to Triska; also a police officer went to Triska's office and advised him to take out a warrant for the plaintiff charging her with receiving stolen property. Triska advised Jurik that "if you are sure they are our trees possibly that is the best thing to do." Thereupon, on May 3, 1912, Jurik went to the police station and swore to a complaint charging the plaintiff with receiving stolen property. The next day two officers went to plaintiff's house to execute the warrant and, being unable to enter through the door, climbed through the open

window and found plaintiff and her daughter in bed, both fully dressed. Plaintiff was taken to the police station and kept until the next day, Sunday, when she was released on bail. When the case came up for hearing on Monday she was discharged by the trial judge, but told to return the trees to the defendants, which she promised to do, and some time thereafter defendants' men removed the trees from plaintiff's yard without objection from her, and took them back to the subdivision.

There was evidence tending to show that the Sasek family had had considerable trouble with the police department from time to time, and an officer testified that plaintiff's reputation for honesty was bad and that he had seen thieves go into her house. There was also evidence that the reputation of her son, Albert, was bad, and there was introduced in evidence the record of his conviction of petit larceny. There was abundant evidence that defendants were informed of the bad reputation of plaintiff and her son before any criminal proceedings were commenced, and that before this time neither of the defendants had ever seen or heard of the plaintiff or her family, and had no ill will whatever against her. There was evidence that Triska had very little part in the matter, except that Jurik reported to him. Triska did not see the complaint and was not present in court when the case came up for hearing.

In Anderson v. Friend, 85 Ill. 135, the court said:

> "To recover in this class of cases, there must be malice on the part of the person starting the prosecution, and a want of probable cause for believing that the accused is guilty of the offense charged; nor is a want of probable cause shown by the acquittal of the accused. If such were the rule, but few, if any, would dare to make any effort to enforce the criminal laws of the State. To

do so, would involve the prosecuting witness, wherever the prosecution failed, in vexatious litigation and loss, and none could be expected to incur such hazards. Prosecuting witnesses must be protected where they act in good faith on facts and circumstances which are such as to induce a belief of guilt in the mind of a reasonable person. This has ever been the rule of the law. The issue, then, for the jury to try is not the guilt of the plaintiff. If the defendant acted in good faith, on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused was guilty of the offense, he is protected."

In Harpham v. Whitney, 77 Ill. 32, it is said:

"To maintain an action for malicious prosecution, it must appear that there was not probable cause for the prosecution, and also that the defendants were actuated by malice in instituting the prosecution. There must be both want of probable cause and malice. If the law imputed malice from want of probable cause, then there would be no distinct requirement of malice, but want of probable cause would be the sole element necessary. It is often said, the jury may infer ~~xxxx~~ malice from the want of probable cause. They may do so under certain circumstances, but not in all cases. Malice is in no case a legal presumption from the want of probable cause, it being for the jury to find from the facts proved, where there was no probable cause, whether there was malice or not. 1 Hilliard on Torts, 486. And if the defendant cannot justify by proof of probable cause, he may still rebut the presumption of malice by showing facts and circumstances calculated to produce at the time, on the mind of a prudent and reasonable man, a well-grounded belief or suspicion of the party's guilt. Ibid. 515. * * * *

"A citizen having reason to believe, or entertain a strong suspicion, upon information or popular report, that a crime has been committed, must be permitted to appear and direct the attention of the grand jury towards its investigation, without exposure to the peril - in case of the failure of conviction, or it turning out that the information upon which he acted was not founded in fact - of being held liable for malicious prosecution, and of being mulcted in ruinous damages. The criminal law does not enforce itself. It requires the agency of some informant to put it in execution."

Many other pertinent quotations might be made from a large number of similar cases, among which are Palmer v. Richardson, 70 Ill. 544; McDavid v. Blevins, 85 Ill. 238; Angelo v. Faul, 85 Ill. 106; Knickerbocker Ice Co. v. Scott, 76 Ill. App. 645; Lissack v. Anderson, 167 Ill. App. 393; Staiger v. Ziegenhein, 165 Ill. App. 622; Millar v. Bellitt, 174 Ill. App. 296.

We are of the opinion, applying these considerations to the facts before us, that probable cause for defendants' actions was proven, and furthermore that such actions were wholly free from malice. That defendants' trees were stolen and that the next day they appeared planted in plaintiff's yard, is established by the evidence. There is very little doubt, if any, that they were stolen by Albert Sasek, whose reputation was bad and who prior there to had been convicted of the crime of larceny. The reputation of plaintiff and her household with the police department was bad. All of these things would lead the defendants, acting with reason and prudence, to believe not only that the trees had been stolen by Albert Sasek, but that the mother knew this; they were traced to her possession under suspicious circumstances, and such circumstances as would furnish the basis of probable cause for the defendants to charge her with receiving stolen property.

Even if it should be conceded that probable cause for their action was not proven, there is no substantial evidence tending to show that the defendants' actions were prompted by malice; they did not know the plaintiff or her family before that time, and of course had had no communications with them; their conduct was animated by the sole purpose of preventing theft of their property and for the purpose of punishing persons towards whom all the circumstances pointed as being guilty; their only purpose was justifiable and free from the element of malice.

Other points have been urged as grounds for reversal, some of which have merit, but in view of our findings as above indicated it is unnecessary to comment thereon. Counsel for plaintiff attempts to make the point that

trees growing upon the land are not the subject of larceny at common law, and that under our statute the removal of a tree comes under the classification of malicious mischief. Without acceding to this proposition, it is sufficient to say that the complaint was made against Mrs. Sasek was not of stealing trees but of receiving stolen property, and, as is well known, trees are bought and sold for planting, as any other property is bought and sold.

On the grounds that probable cause for the prosecution was shown, and that there was no evidence of malice, the judgment is reversed with a finding of fact.

REVERSED.

FINDING OF FACT.

The court finds that there was probable cause for the defendants to prosecute plaintiff upon the charge of receiving stolen property, and we also find that there was no evidence that in so acting the defendants were moved thereto by malice.

FINDING OF FACT.

The court finds that there was probable cause for the defendants to prosecute plaintiff upon the charge of receiving stolen property, and we also find that there was no evidence that in so doing the defendants were moved unduly by malice.

453 - 22887

ROGERS & HALL COMPANY,
a corporation,
Appellee,

vs.

JAMES H. WALDEN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 415

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for $1,497.02, entered upon a verdict in a suit brought by plaintiff for rent.

The basis of plaintiff's claim is a written agreement signed by both parties. The trial court was of the opinion that this was a lease, as claimed by the plaintiff and opposed by defendant. Most of the argument in this court is concerned with the question of whether or not this instrument shall be construed as a lease. The instrument was made in the month of September, 1911. Omitting certain immaterial provisions, the agreement is as follows:

> "We hereby agree to rent to James H. Walden, doing business as the Walden Typesetting Company, 501 Plymouth Court, the fifth floor of the new building being erected by us on the northeast corner of Polk and La Salle streets for a term of ten years from May 1, 1912, at the rate of $3,500.00 per year for the first five years and for the second five years at such a rate as we may mutually agree upon, but not to exceed $4,000.00 per year. James H. Walden has the privilege of cancelling this lease at the end of the first five years by giving us eight months previous notice.
>
> * * * * *
>
> "It is further understood that the power and light is to be furnished through our meter and we to give him the benefit of the saving that may be obtained thereby.
>
> "We agree to do what is usual to be done to the premises.
>
> "James H. Walden, it is agreed, may move into the building shortly after completed and for the purpose particularly of avoiding the rush of the usual first of May moving. Rent to be free to May 1, 1912.

JAMES H. WALDEN,
Appellant.

vs.

Appellee,

a corporation,

RUCKER & HALL COMPANY,

APPEAL FROM SUPERIOR

COURT OF CHICAGO.

MR. PRESIDING JUSTICE MORAN

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered re-
covered for $1,407.02, entered upon a verdict in a suit
brought by plaintiff for rent.

The basis of plaintiff's claim is a written
agreement signed by both parties. The trial court was of
the opinion that this was a lease, as claimed by the plain-
tiff and opposed by defendant. Most of the argument in
this court is concerned with the question of whether or not
this instrument shall be construed as a lease. The instru-
ment was made in the month of September, 1911. Omitting
certain immaterial provisions, the agreement is as follows:

"We hereby agree to rent to James H. Walden,
doing business as the Walden Typewriting Company, 201
Pinewood Court, the fifth floor of the new building being
erected by us on the northeast corner of Polk and La
Salle streets for a term of ten years from May 1, 1912,
at the rate of $1,200.00 per year for the first five
years and for the second five years at such a rate as we
may mutually agree upon, but not to exceed $1,800.00 per
year. James H. Walden has the privilege of cancelling
this lease at the end of the first five years by giving
us eight months previous notice.

* * * *

"It is further understood that the power and
right is to be furnished through our meter and we to give
him the benefit of the saving that may be obtained there-
by.

"We agree to do what is usual to be done to the
premises.

"James H. Walden, it is agreed, may move into
the building shortly after completed and for the purpose
partitioning off and fixing the room of the same first or
May moving. Rent to be free to May 1, 1912.

"Both parties to this agreement, agree to execute within a reasonable time, the Customary Form of Lease.

Rogers & Hall Co.,
(Signed) Luther C. Rogers,
President.

(Signed) J. H. Walden,
doing business as
Walden Typesetting Company."

Such an instrument has frequently been held to be a lease, for the reason that it contains all the essentials. Among the cases so holding are DeLue v. Spear, 192 Ill. App. 254; Illinois Life Ins. Co. v. Beifeld, 192 Ill. App. 582; Bradley v. Metropolitan Music Co., 89 Minn. 516; Holley v. Young, 66 Me. 520; Haven & White v. Wakefield, 39 Ill. 509. The mere fact that the instrument contains a provision looking to the execution of the lease in another form, does not make this instrument any less binding. Bradley v. Metropolitan Music Co., 89 Minn. 516; Feust v. Craig, 107 N. Y. Supp. 637; Staackman, Horschitz & Co., v. Cary, 197 Ill. App. 601. In Scott v. Fowler, 227 Ill.104, the court quoted with approval from Bishop on Contracts, sec. 319, as follows:

"If the parties agree on terms, however precise, 'subject to the preparation and approval of a formal contract,' the concurrence of their wills is suspended, and where nothing further is done there is no contract. Yet the mere fact that the reduction of an informal agreement, oral or written, to a formal written one was contemplated or stipulated for does not prevent the former from taking immediate effect. The question of whether it does or not depends upon what the parties intended.

We are of the opinion that the conduct of the parties indicated an intention that this document should be considered as the lease between them, and that the agreement subsequently to execute "the customary form of lease" was waived by mutual consent. Among the facts influencing us to this conclusion are that defendant sublet one-half of his space to the George Seton Thompson Company under a written instrument, in which the document between plaintiff and defendant is referred to as a lease, and concluding as follows:

"[illegible] parties to this agreement, agree to execute within a reasonable time, the Customary Form of Lease.

Hyman & Hall Co.,
(Signed) Luther C. Rogers,
President.

(Signed) J. R. Wallen,
being desirous as
Welsan Typewriting Company."

Such an instrument was frequently been held to be a lease, for the reason that it contains all the essentials. Among the cases so holding are Jayne v. Spear, 192 Ill. App. 294; Illinois Life Ins. Co. v. Bottrell, 192 Ill. App. 382; Bradley v. Metropolitan Music Co., 89 Minn. 318; Hollay v. Young, 66 Ne. 980; Haven & White v. Warfield, 39 Ill. 309. The mere fact that the instrument contains a provision looking to the execution of the lease in another form, does not make this instrument any less binding.

Bradley v. Metropolitan Music Co., 89 Minn. 318; Jayne v. Craig, 192 Ill. App. 294; Blanchard, Morse Ice & Co., v. Carr, 197 Ill. App. 803. In Beebe v. Porter, 247 Ill.264, the court quoted with approval from Hisop on Contracts, sec. 318, as follows:

"If the parties agree on terms, however pre-
[illegible] to the preparation and execution of a formal
contract, the enforcibility of their writing is unaffected
and where nothing further in fact there is no contract.
[illegible] the mere fact that the execution of an informal agree-
ment, oral or written, is a formal writing does not [illegible]
or obligate an [illegible] from [illegible]
immediate effect. The execution of another it does or does
depends upon what the parties intended.

We are of the opinion that the contract of the parties indicated an intention that this instrument should be considered as the lease between them, and that the agreement subsequently to execute "the customary form of lease" was waived by mutual consent. Among the facts influencing us to this conclusion are that defendant paid one-half of his share to the George Oetzen Company under a written instrument, in which the document plainly and definitely is referred to as a lease, and concluding as follows:

"It is understood that I am leasing the entire floor from Rogers & Hall Co. and that the lease I make with you is subject to conditions and agreements contained in my lease with Rogers & Hall Co. A copy of my lease with Rogers & Hall Co. is herewith attached."

This document was signed by the defendant, and a copy of the above agreement between the Rogers & Hall Company and Walden was attached to the document of subletting to the George Seton Thompson Company. Walden took possession of the west half of the 5th floor, the premises described in this document, about March 1, 1912, and soon thereafter his sub-tenant, the Thompson Company, took possession of the east half. It is true that negotiations were had between the parties looking to the execution of a more formal lease, and such an instrument was prepared and examined, but the parties were unable to agree as to the details, and finally, by the apparent acquiescence of both parties, the matter of the execution of a more formal document was abandoned. Walden paid rent for the entire 5th floor at the rate reserved in the document first above mentioned, in monthly installments of $291.67, from May 1, 1912, to June 1, 1914, when he abandoned the west half of the premises. The sub-tenant, Thompson Company, paid Walden the rent stipulated in its agreement with Walden up to May 31, 1914, and also all of June, 1914, except twelve or thirteen dollars. This conduct makes certain any possible question as to the character of this instrument, which was acted upon by both parties as a valid and binding lease, and we are of the opinion that such was the character of the instrument. Among the cases in accord with this holding under similar facts are Grigsby v. Western Union Tel. Co., 5 S. D. 561; Merki v. Merki, 113 Ill. App. 518; Bulkley v. Divine, 127 Ill. 406; Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209. We hold that the trial

"It is understood that I am leasing the entire floor from Rogers & Hall Co. and that the lease I make with you is subject to conditions and agreements contained in my lease with Rogers & Hall Co. A copy of my lease with Rogers & Hall Co. is herewith attached."

This document was signed by the defendant, and a copy of the above agreement between the Rogers & Hall Company and Walden was attached to the document of subletting to the George Leton Thompson Company. Walden took possession of the west half of the 5th floor, the premises described in said lease, about March 1, 1911, and soon thereafter his sub-tenant, the Thompson Company, took possession of the east half. It is true that negotiations were had between the parties looking to the execution of a more formal lease, and such an instrument was prepared and examined, but the parties were unable to agree as to the details, and finally, at the expiration of both parties, the matter of the execution of a more formal document was abandoned. Walden paid rent for the entire 5th floor at the rate reserved in the lease first above mentioned, in monthly installments of $291.67, from May 1, 1911, to June 1, 1913, when he abandoned the west half of the premises. The sub-tenant, Thompson Company, paid Walden the rent stipulated in its agreement with Walden up to May 31, 1913, and also all of June, 1913, except twelve or fifteen dollars. This account makes certain only possible exceptions as to the character of this instrument, which was acted upon by both parties as a valid and existing lease, and we are of the opinion that much was the character of the instrument. Among the cases in accord with this holding under similar facts are Gridley v. Western Union Tel. Co., 9 S. D. 611; Bond v. Byrd, 113 Ill. App. 316; Bulkley v. Irving, 147 Ill. 404; Bowers v. Pettibone Bros. Paris Co., 144 F. 7. 209. We hold that the trial

court was correct in construing this document to be a lease.

There is no merit in the point that the plaintiff deprived defendant of possession of the premises. After Walden vacated the west half of the premises the Thompson Company continued to occupy the part it had leased from him. As this company was the sub-tenant of Walden, in legal contemplation its possession was the possession of its lessor, Walden; defendant could not make a surrender of the tenancy without yielding up the premises demised to him by his lease; he did not do so. In 18 Am. & Eng. Ency. of Law, 359, the rule is stated thus: "The surrender of the possession of a part of the demised premises and a proportionate reduction of the rent do not amount to a surrender by operation of law of the old tenancy and the creation of a new; a surrender, to be an end to the lease, should be in entirety." In Nachbour v. Wiener, 34 Ill. App. 237, the court said: "The defendants not having tendered full possession after giving the notice required by law, the lease is still in force." Other cases so holding are Burnham v. O'Grady, 90 Wis. 461; Cook v. Curry, 192 Ill. App. 182; and in Ballance v. Peoria, 180 Ill. 29, the court said: "Upon the expiration of the lease the city was bound to surrender the possession of all the property embraced in the lease to appellant. An offer to surrender a part was not sufficient, as appellant was under no obligation to accept a part."

We do not agree with the contention that plaintiff leased to the Thompson Company from July 1, 1914, thereby terminating Walden's liability for rent as of that date. This suit was begun on October 24, 1914, to recover rent from Walden for the months of June to October, inclusive. The defendant's affidavit of merits was filed on November 28, 1914. In the latter part of December of this year, the

Thompson Company being then indebted to Walden for rent from July to December, executed a note for the amount due, $750, and delivered the same to the Rogers & Hall Company, under the conditions that that company would agree to protect the Thompson Company in case Walden should thereafter make claim against the Thompson Company for rent for these months. Thompson was informed by plaintiff that a suit was then pending against defendant to recover rent due for June to October, and that the moneys received in payment of the Thompson note would be applied on Walden's account for the months of November, 1914, and the succeeding months. Up to the time of trial $200 had been paid on the said notes, and Rogers testified that this payment was applied on the rent due from Walden for the months of November and December. We do not see how the giving of this note could affect the liability of Walden for the rental for June to October, inclusive. The note was not accepted as payment on account of rent during this period. Under the agreement between plaintiff and defendant, which we have construed to be a lease, defendant was liable for rental accruing after the beginning of this suit, and plaintiff had the right to apply whatever might be collected from Walden's sub-tenant on account of the subsequently accruing rental.

Even if the conversation and transaction between plaintiff and the Thompson Company should be held to be a reletting in December, 1914, this would not amount to a surrender by plaintiff of the lease. The rule in this state is as stated in Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514: "In case of an abandonment without fault of the landlord or as a result of his acts, he may re-enter and again rent the premises and credit the lessee with the proceeds, and his so taking possession does not relieve

from the payment of rent." This is re-affirmed in Marshall v. Grosse Clothing Co., 184 Ill. 421.

We see no substantial reason for reversing the judgment, and it is affirmed.

AFFIRMED.

from the payment of rent." This is re-affirmed in Kimball
v. Crosse Dipping Co., 184 111, 481.

We see no substantial reason for reversing the
judgment, and it is affirmed.

AFFIRMED.

457 - 22891

CLIFFORD HODGES, a Minor, by Alfred Hodges, his next friend,
Appellee,

vs.

CHARLES A. COEY, doing business as Charles A. Coey School of Motoring,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 417

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, while riding a bicycle in Michigan avenue, was struck and injured by an automobile belonging to the defendant; he brought suit and had a verdict and judgment for $500, which the defendant seeks to have reversed.

From the evidence the jury could properly find that in September, 1914, Clifford Hodges, a minor, was working for the Western Union Telegraph Company as a messenger boy; that he was going south in Michigan avenue near 21st street on a bicycle in the discharge of his duties; that he crossed 21st street on the right-hand side, about three feet from the curb; that defendant's automobile was approaching from the south and going north; that as it came to 21st street it cut diagonally across westward into 21st street, and struck Hodges and his bicycle, at a point about three feet from the southwest corner, and carried him about five feet around the corner into 21st street; that the automobile made the turn at about 15 miles an hour, to the left of the center line of 21st street and Michigan avenue. The conclusion of the jury that the plaintiff was in the exercise of ordinary

Yabolinev.
as Charles V. Cody attest of
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CHARLES E. CODY, coin- painters
as.
Yabolinev.
Gifted Nodes, his next friend,
Plaintiff, }
}
vs. } DECREE IN PARTITION.
}
Gifted Nodes, a minor, by

[illegible]

DECREED THE DIVISION OF THE COURT.

88. PERMISSIVE USE[illegible] Mortgage

[illegible]

Plaintiff, a minor, while riding a bicycle in Bicking avenue, was struck and injured by an automobile belonging to the defendant; he brought suit and had a verdict and judgment for $500. After the defendant began to make restored.

Upon the evidence the Jury could properly find that in September, 1916, Clifford Nodes, a minor, was working for the Western Union Telegraph Company as a messenger boy; that he was going south in Bickley avenue upon that at a point about three feet from the footpath; that as it came to Flat street it was ordinarily narrow; about three feet from the curb; that defendant's side. It was claimed that street as the right-hand turned into flat street, and struck Nodes and his horse, but that the defendant was in the exercise of ordinary care, and carried five feet around the corner of the footpath into flat street; that the automobile made the turn at about 15 miles an hour, to the left of the center line of

care for his own safety and that the accident was occasioned by the negligence of the defendant was fully justified from the evidence.

Most of the argument in this court is taken up with a discussion of the pleadings, which we do not think it necessary to consider. This was an action in the Municipal Court of the fourth class, and all that plaintiff was required to do was to file a brief statement giving the nature of the tort, and such further information as would reasonably inform the defendant of the nature of the case. Plaintiff's statement of claim contains what are called three counts, which we do not think was at all necessary; taken as a whole, however, we think they complied with the requirements in a case of this class.

There was no error in the admission of evidence or in the instructions of the court. Neither do we think that the verdict was excessive.

Both counsel have attempted by extended discussion of technical rules of pleading and evidence to confuse the simple elements of this case. We do not feel called upon to follow the many points discussed. Under the undisputed evidence the plaintiff was entitled to recover, and the judgment is affirmed.

AFFIRMED.

473 - 22907

JOHN LISS,
Appellee,

vs.

HASKELL AND BARKER CAR COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 418

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, while employed by the defendant in its car factory at Michigan City, Indiana, on June 17, 1914, was injured. He brought this suit for damages and had a verdict and judgment for $20,000 from which the defendant appeals.

Plaintiff was injured while passing between two cars which were pushed together suddenly by a switch engine, on a track in one of the shops of the defendant, and in his declaration it was charged that the defendant failed to give plaintiff warning that the cars were about to be coupled, and that the servants of the defendant carelessly and negligently pushed these cars together.

The negligence was predicated upon the Employer's Liability Act of the State of Indiana, which was properly pleaded and introduced in evidence on the trial. Section 1 of this act provides that a master shall be liable to a servant for an injury sustained through the negligence of a fellow servant; section 2 that the burden of proving contributory negligence is upon the defendant; and section 7 provides that all questions of assumption of risk, negligence or contributory negligence, shall be questions of fact for the jury to decide. These provisions of the Indiana statute

are binding in this forum, where the case was tried, even though contrary to our local practice. Central Vermont Ry. Co. v. White, 238 U. S. 507. This seems to be conceded by counsel for the defendant.

The undisputed facts are that the accident occurred in what was known as shop No. 49, which from north to south is 337 feet long and about 50 feet wide. Six railroad tracks run into this shop from the south and nearly to the north end; they are numbered consecutively from west to east. Just south of the building the tracks crossed a street and proceeded on a curve, so that a workman at the north end of the shop could not see on which track a locomotive was approaching as it came towards the building. The custom was to push skeleton trucks onto these various tracks in the shop by means of switch engines, leaving the trucks about three or four feet apart. Defendant's workmen would then build cars on these trucks. When they were ready to be pulled out the switching crew would back a locomotive into the shop, couple together the completed cars, pull them away, and replace skeleton trucks on the tracks. About 90 employes of the defendant were working in this shop. Plaintiff was one of the carpenters engaged in building floors in the cars. The lumber used for this purpose was piled up on the east side of the shop. On the day in question plaintiff was working on a car situated on track 2, as he claims, defendant claiming it was on track 3. He was a little north of the center of the shop and was working on the third car from the north. On the same track, south of him, were situated some five other cars that had been completed; the three cars at the north end of the track had not been completed. Plaintiff had gone to the east side of the building for lumber to be used in laying the floor in the car on which he was working, and

had returned with it to the car in question and deposited it on the car; he was going east again for the purpose of getting some more lumber, passing between the car he was working on and the car immediately north of him, and while so doing a locomotive engine backed against the string of cars from the south, so that he was struck and sustained the injuries complained of.

Is the verdict contrary to the weight of the evidence? We are of the opinion, after giving due weight and consideration to the variant stories of the witnesses, that the jury could properly find that plaintiff was working, as he said, on the third car from the north on track 2; that before he started to cross track 2, between the second and third cars, on his way east for more lumber, he looked in both directions, saw no engine and heard no warning, either by the whistle of the locomotive or by the shouting of anyone, but as he got between the cars he was suddenly hit by the car from the south. Plaintiff's story that no warning of any kind was given was supported by abundant evidence.

The jury was justified in concluding that plaintiff was not guilty of contributory negligence. Four or five switch engines were used in the various shops in that vicinity and were constantly pulling cars back and forth; the locomotives were whistling constantly and bells ringing all the time; the locomotive bells were rung and whistles sounded as they crossed the street just south of the entrance to shop 49. There was also evidence that within the shop there was a great deal of noise of hammering, driving nails, throwing material, and noises generally incident to work in a shop of this kind; that on account of the curve in the tracks where the locomotives entered the doorway of the shop from the south, and the presence of many cars inside of this long

shop, it was impossible for a person inside to tell whether one was coming into the shop or not, or which track it was coming on, unless the workmen should be very near to the south end. There was evidence that a system had been adopted by the defendant to warn workmen, as follows: after the engine had crossed the street at the entrance and gotten into the shop it would stop; the brakeman and the yardmaster would walk up to the first car to be coupled, to see if there was anyone working on that car or passing between the opening; if there were any such persons they would be warned and then the engineer signaled to make the coupling - and so on down the line between the cars. In this way a string of cars could be coupled in a very short time, and all persons working in and about them would be warned that they were about to be moved. The evidence shows that plaintiff was familiar with this custom and that he relied upon its performance, but that it was not observed at the time of the accident in question. There was contrary evidence as to the existence of such custom, but it was sufficiently proven to have existed. Instead of following this custom the locomotive attempted to couple all the eight cars with a single push.

There was no evidence of sufficient probative force to lead to the conclusion that plaintiff was working at a place where he had been told by the foreman not to work, and the jury could properly decline to give credence to the statement of the witness Zimmerman in this regard.

Under the Indiana statute above referred to the burden of proving contributory negligence is upon the defendant. The jury was amply warranted in finding not only that defendant had failed to prove contributory negligence but that

dependent upon failure to prove contributory negligence per the
ant. The jury was amply warranted in finding not only that
burden of pleading contributory negligence is upon the defend-
ment of the witness Simmerson in this regard.

Under the Indiana statute related to the
jury could properly decline to give credence to the state-
force to lend to the speculation that plaintiff was moving at
a pace worse he had been told by the fireman was to be, and
the existence of such custom, but it was sufficiently plainly
to have existed. Instead of following this custom the Inter-
motive attempted to couple all the cars that came with a single
pany.

There was no evidence of sufficient prejudice

ity was familiar with this custom and that he relied upon
its performance, but that it was not observed at the time of
the accident in question. There was contrary evidence as to
the existence of such custom, but it was sufficiently plain
they were about to be moved. The evidence more that plain-
all persons working in and about them would be warned that
arting of cars could be coupled in a very short time, and
and no on down the line between the cars. In this way a
warned not than the engineer signaled to move the coupling -
the theory; if there were any such persons they would be
there was anyone working on that car or passing between
would walk up to the first car to be coupled, to see if
the shop it would step; the presence and the temperature
line had crossed the street at the entrance and rotten into
by the defendant to warn workers, as follows: after the an-
south end. There was evidence that a switch had been adjusted
coming on, unless the workmen should be very near to the
one was coming into the shop or not, or which track it was
shop, it was impossible for a person inside to tell whether

plaintiff had not been guilty of conduct amounting to negligence which contributed to the accident.

Even if we were so disposed, we do not see how we could hold that the verdict was contrary to the weight of the evidence, in view of the fact that the bill of exceptions before us does not contain all the exhibits in the case. At least one, if not more, blue-print and a photograph were introduced as exhibits and shown to the jury. These apparently indicated the position of the tracks and surroundings, and would have great value in fixing in the minds of the jury the physical situation and surroundings. In the absence of these exhibits in the record before us, we do not see how we could presume to find the weight of the evidence contrary to the finding of the jury; we could not do so until we had inspected and examined the same evidence upon which the jury passed. See Dahl v. McDonald Engineering Co., 141 Ill. App. 187; Beaverns v. Lipschinski, 82 Ill. App. 298; C. & I. R. R. Co. v. Hopkins, 90 Ill. 316; R. I. & P. Ry. Co. v. Leisy Brewing Co., 174 Ill. 547.

We are not disposed to hold that the damages are excessive, one reason being in line with the point just made, namely, that the bill of exceptions does not contain all the exhibits. The record shows that several X-ray plates and photographs were identified and testified about by doctors on both sides, none of which is contained in the bill of exceptions. There is some question as to whether all of them were formally offered in evidence, but at least one was.

The most serious injury to plaintiff was a fracture of the pubic arch, with a rupture of the bladder; a disintegration of the pubic bone seems to have followed,

with also abdominal hernia; inflammation of the separated ligaments formerly attached to part of the bone which was missing, so as to render it difficult for plaintiff to use his left leg in walking; weakening of the pelvic arch by the fracture of the arch and the removal of the bone had stretched the muscles of the back, causing intense pain; there is also severe bladder disease, occasioned by the broken pelvic bones breaking the bladder, causing infection and inflammation.

Judgments for even larger amounts than was awarded in this case have been sustained where the injuries were not substantially more serious. This court sustained a judgment for injuries of $45,000 in Wilson v. B. & O. R. R. Co., 194 Ill. App. 491, - a case which seems to have escaped the attention of counsel. Plaintiff has received a very serious permanent injury, and we cannot say that the amount of the judgment is excessive.

Complaint is made of the action of the court in the giving and refusal of certain instructions, rulings on evidence, and also of the argument of plaintiff's counsel to the jury. We have given these points consideration, and are of the opinion that none of them is sufficient in importance to require a reversal.

There was no error in the action of the court in denying defendant's motion to withdraw a juror. It is unnecessary to narrate the circumstances in full which gave rise to this motion. Nothing said by the juror can be construed as meaning that the jurors had talked about the case and arrived at a conclusion as to liability before the case had been submitted to them.

Upon the entire record we are of the opinion that the verdict was amply supported by the evidence and that

the trial was free from prejudicial error; hence the judgment is affirmed.

AFFIRMED.

488 - 22922

PETER SINDAK,
Appellee,

vs.

STANLEY JASKOWIAK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 420

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $600 had by plaintiff in a suit to recover damages for injuries sustained by being bitten by defendant's dog.

From the evidence the jury properly could find that plaintiff was visiting some friends who lived in a house on the rear of a lot on the front of which was the defendant's saloon. As plaintiff was coming down the steps of the house, a helper of the defendant led the dog nearby with a chain, and when plaintiff was on about the third or fourth step from the bottom the dog jumped and bit his leg.

We cannot disagree with the conclusion of the jury that the dog was of a vicious character, which fact was known to the defendant. The dog was kept in the basement as a watchdog; at times it was chained in the yard, and continually jumped and barked at those who went by. One witness, before this time, had been bitten by the dog and told defendant of this, and was advised by him not to go near the dog. From defendant's own statement it appears that the dog was kept as a watch-dog against burglars and not allowed to run at large at any time.

We are not inclined to hold that there were any reversible errors upon the rulings on evidence or in the instructions. The instructions were given in a series, and

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after they were given the court inquired for any objections, and none was made. Neither were any specific objections made before the jury retired, as required by the Municipal Court rules.

It is claimed that the judgment was excessive. The verdict of the jury was for $900, which was remitted to $600. There was evidence tending to show that the plaintiff bled profusely from the bite and was under the care of a physician for nearly three months; the doctor says that the laceration of the muscles has caused a condition which is permanent, and plaintiff says that his leg still bothers him. He suffered an actual loss of 20 weeks' time at $18 a week. We shall not disturb the judgment.

The suggestion of plaintiff's counsel that he be allowed statutory damages will be denied.

The judgment is affirmed.

AFFIRMED.

503 - 22937

WILLIAM A. ZENO,
Appellee,

vs.

DR. JAMES H. BALLARD,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 421

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment against the defendant of $70 in an action for malicious prosecution.

We hold that the preponderance of the evidence shows that the plaintiff had forged the signature of the defendant to a receipt for two Tungsten lamps and thereby secured the lamps; that plaintiff possessed a bad reputation, having previously served nine months in the bridewell on a one year sentence for forgery; that he practiced dentistry under assumed names, one being the name "Dr. Ballard"; that he was a married man but did not live with or support his family; that prior to swearing out the warrant for plaintiff's arrest the defendant went to the state's attorney's office in Chicago and stated the facts accurately to two assistant state's attorneys, showing them the forged receipt; that he was advised by them to get out a warrant for the arrest of the plaintiff for forgery, and directed to Assistant State's Attorney Thomas Finn at the Maxwell street branch station of the Municipal Court; that defendant there stated the facts to Mr. Finn, showing him the forged receipt, and was advised by him to get out a warrant for the

Appellant,

-vs-

Appellee.

Appeal from Municipal Court,

Hon. Frank E. Reilly,

Judge Presid.

Appellant.

Appellee.

Appeal from Municipal Court,

Hon. Frank E. Reilly,

Judge Presid.

plaintiff; that pursuant to this advice he swore to a complaint and caused a warrant for the arrest of the plaintiff to be issued.

It is the rule that "where a person before commencing criminal proceedings consults an attorney in good standing and gives him all the facts, and then acts upon the attorney's advice, he will not be liable in an action for malicious prosecution. Ross v. Inniss, 26 Ill. 259." Dahlberg v. Grace, 178 Ill. App. 97. This rule fits the case before us. Defendant, after having given all the facts to reputable attorneys, acted upon their advice; having done so, he cannot be held answerable in this action.

The judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

526 - 22960

JOHN C. CANNON, Admr. Estate
Cornelius J. Lynch, Deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 423

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against it for $10,000 had by plaintiff in an action to recover damages for the alleged wrongful death of Cornelius J. Lynch, deceased.

Plaintiff by his declaration alleges in substance that while the deceased in his lifetime, in the exercise of reasonable care, was crossing Madison street, the defendant, by its servants in charge of an eastbound car, so negligently managed it that it ran towards and upon such street crossing without any warning and at a high and dangerous rate of speed; that it struck deceased and fatally injured him.

The accident occurred on July 29, 1912, about 3:30 p. m., on Madison street some little distance west of California avenue, which is a north and south cross street. Deceased had alighted from a westbound Madison street car, and was going around the end of it and then southward, with the apparent intention of crossing the street, when he was struck by an eastbound car running on the parallel track.

That the motorman running the eastbound car was negligent seems to be conceded. The evidence shows that the westbound car had stopped at the usual stopping place to permit a number of passengers to alight, when the eastbound car

came by without any warning gong, at a rate of speed estimated at about 25 miles an hour. The jury would be amply justified in concluding that such operation of the eastbound car, under the circumstances, was negligent as charged in plaintiff's declaration.

Was Lynch guilty of contributory negligence? This question has been argued by counsel for both parties with great elaboration and detail. There are also citations of and quotations from a very large number of decisions, which are of no very great assistance to us; the facts there involved, while somewhat similar in general outline, cannot be in every respect like those before us; each case must be determined upon the particular facts involved.

After giving due consideration to the testimony of the witnesses and the conflicting arguments of counsel, we are of the opinion that the jury properly could find that after Lynch alighted from the westbound car he walked to the south in the rear some two to four feet back of it; that he walked slowly, in the usual and ordinary manner; that as he came around the car and towards the eastbound track he looked to the west. Some of the witnesses say that he glanced to the west; one witness said that he leaned over looking to the west, and that at this time the car was "right on top of him," also that he looked before he got to the eastbound track and was in a bent-over position. Another witness described him as walking towards the eastbound track "very cautiously," "trying hard to see if something was coming towards him." As he was walking towards the south another man was walking towards him from the opposite direction and was near the south rail of the eastbound track and only eight to twelve feet from him; there was nothing between this man and the eastbound track to obstruct his view of any approaching car.

This man testified that "all of a sudden I heard the rumble of a car and I turned around and it was right on top of me, and I jumped back off the track, and as I jumped back I saw Lynch get hit by the corner of the car. I was about 18 inches from the car when I jumped back. After that that car went east and stopped on the other side of California avenue, the east side. * * I did not hear any bell or gong on that car; if any had been rung I think I would have heard it. * * The car that struck him was going between 25 and 30 miles an hour, in my judgment." This witness also said that his hearing and eyesight were good.

The westbound car stopped at from 20 to 50 feet (the testimony varies) west of the west cross-walk of California avenue, and about straight across from where a Colorado avenue car was then waiting at its terminus on the south side of Madison street. Colorado avenue terminates at this point at Madison street, and runs thence in a southwesterly direction; this is a transfer point and a busy place, and apparently Lynch was going across the street for the purpose of taking this Colorado avenue car.

The eastbound car was going at a rate of speed estimated by some witnesses as 30 miles an hour; it sounded no bell or gong; after striking Lynch it ran eastward over 200 feet before it was stopped.

In view of the unusual occurrence of a car at a busy transfer point passing without warning, at a high rate of speed, another car on a parallel track, which was stopped to permit passengers to alight, some of whom might cross the eastbound track to take the transfer car, and also in view of the conduct of the man approaching the eastbound track from the south who, with a clear vision, gave no indication of any car approaching on that track, and in view of

all the circumstances surrounding Lynch and his conduct at the time in walking cautiously and looking westward, we see no reason to disagree with the conclusion of the jury that he was exercising ordinary and usual care for his own safety, such as would be used by the ordinarily prudent man under the same circumstances, both before and at the instant of the accident. If this is true, he was guiltless of contributory negligence.

We purposely refrain from citing decided cases, for the reason that they run on both sides of the question of contributory negligence under somewhat similar facts. We have, however, had in mind the general principles announced therein in arriving at our conclusion.

It was not error to give the instructions requested on behalf of the plaintiff. Instruction No. 10 has been approved in many cases, among which are Wilcke v. Henrotin, 241 Ill. 169; Chicago City Ry. Co. v. Ryan, 225 Ill. 287. We have had occasion to criticise instruction No. 11 as tending to direct attention of the jury particularly to the evidence of employes of the defendant, with an implication that they were interested in the result of the case (Carlin v. Chicago Rys. Co., 22860 this court, opinion filed April 16, 1917); in a close case where the testimony of the employes was the subject of controversy and vital, the giving of it might be held reversible error. We do not think this is true in this case; there was no serious controversy over matters testified to by the employes of the defendant, and furthermore, by another instruction the jurors were told that they could not discriminate against the testimony of defendant's employes, or disregard or minimize it upon

that ground. It also might be said that in this case there was evidence tending to show that other witnesses might have been interested.

From the record as a whole we see no reason to disagree with the conclusion of the jury, and as there were no prejudicial errors upon the trial the judgment is affirmed.

Counsel for the plaintiff has made a motion that statutory damages be allowed on the ground that the appeal has been prosecuted for delay. We are not disposed to grant this motion, and it is denied.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

330 - 22764

WARREN LAND COMPANY, a corporation,
Appellee,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM COUNTY COURT, COOK COUNTY.

205 I.A. 425

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the County Court of Cook County against the defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, to recover damages which plaintiff alleged it had sustained by reason of an unreasonable delay occasioned by the defendant, a common carrier, in the carriage and delivery of four carloads of hay which had been delivered by plaintiff to the defendant at Warren, Wisconsin, for shipment over defendant's lines and those of a connecting carrier, the Chicago & Northwestern Railway Company, to Walters Brothers Commission Company at Chicago. The trial court entered judgment in favor of the plaintiff for the sum of $297, and the defendant brings the case here by appeal for review.

The case was before this court on a former appeal from a judgment in favor of the plaintiff, and is reported in volume 195 Illinois Appellate Reports at page 157; the judgment was reversed and the cause remanded to the trial court for a new trial, for an error of the court below in instructing the jury as to the measure of damages.

The facts presented by the record before us are not materially different from those presented to this court on the earlier hearing. Some additional evidence was introduced

vs.

Appellee.

Appellant.

touching the question as to whether the defendant or its connecting carrier was or was not guilty of negligence in failing to deliver within a reasonable time to plaintiff's consignee at Chicago the carloads of hay in question. The material facts in the case are presented in the opinion delivered by Mr. Justice Pam of this court on the earlier hearing. We refer to this opinion and we adopt the conclusions of law and fact therein set forth. In Boyle Ice Co. v. California Ice Co., 194 Ill. App. 475, this court, by Mr. Presiding Justice McSurely, said:

> "On motives of expediency, even were it not a rule of law, rules laid down by one Appellate Court in a case should be held as the law for that case at any subsequent time it may come up, either in the nisi prius or Appellate Court, notwithstanding plausible or even convincing arguments against them."

We have, however, examined the record and the briefs of counsel filed on this appeal, and we are of the opinion that the evidence heard upon the last trial was amply sufficient to sustain the verdict of the jury both as to the question of negligence on the part of the defendant and the question of whether the plaintiff or its consignee was responsible for the delay which it is conceded did occur between the date of the shipment of the merchandise in question and the delivery thereof at Chicago to plaintiff's consignee.

Many of the questions which have been argued on this appeal were determined by this court on the former appeal, and hence we are precluded from considering such questions. No new questions have been presented which in our opinion would warrant a reversal or a retrial of the case. At the former hearing the judgment was reversed and the cause remanded for error in the giving of an instruction relating to the measure of damages. No complaint is made by

the defendant of any error in this particular on the part of the trial judge on the last trial.

The judgment of the County Court will be affirmed.

AFFIRMED.

333 - 22767

GERTRUDE WIMMER,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 426

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment in the Circuit Court against the defendant for the sum of $6,400, and the defendant brings the case here by appeal for review.

In her declaration the plaintiff alleges that on the 23rd day of June, 1910, the defendant was operating a street car in 12th street in the city of Chicago; that she was a passenger thereon, and that by and because the defendant and its servants negligently caused said car to be jerked and jolted, the plaintiff was thrown off the car and she sustained serious and permanent injuries.

The case was in this court once before, and is reported in 185 Illinois Appellate Reports, page 523.

But two questions are presented for determination by this court. It is urged, first, on behalf of the defendant that the verdict of the jury is contrary to the weight of the evidence introduced upon the trial, and, second, that the verdict is excessive.

In her own behalf the plaintiff testified that on the day in question she was riding in defendant's street car west in 12th street; that her home was at 1226 Springfield avenue; that about 200 feet east of Springfield avenue, and as she was standing upon the rear platform of the car, the car suddenly jolted and jerked, and she was thereby thrown to the ground and sustained certain injuries. The accident happened about 2:30 p. m.

Av.

Appellee.

Appellee.

The plaintiff recovered a judgment in the District Court against the defendant for the sum of $4,000, and the defendant brings the case here by ordinary law review.

On the day mentioned the plaintiff sitting down on the 82nd day of June, 1911, the defendant was operating a street car in that street in the city of Chicago; that he was operating electric power, and that by said process the defendant had its entrance sufficiently covered only car to be lawful and safe for passengers. It was the duty of the plaintiff and the motorman jointly, the plaintiff was from all the car and the motorman waiting new passengers injured.

The case was in this court once before, and is reported in 182 Illinois Appellate Reports, page 321.

But two questions are presented for determination by this court. It is urged, first, on behalf of the defendant that the verdict of the jury is contrary to the weight of the evidence introduced upon the trial, and, second, that the action of the court in refusing to admit evidence is erroneous.

It was upon behalf the plaintiff insisted that on the day in question the defendant's motorman was operating the car, in an unusual and careless manner; that he threw the car forward with a violent jerk; that by reason of defendant's motorman; and that as the result of the said jerk the plaintiff was thrown from the car, and

12th street is an east and west street; Springfield avenue and Avers avenue are north and south streets, and Avers avenue is the next street east of Springfield avenue. Plaintiff in her testimony stated that as the car crossed Avers avenue and when it was just west of this street, she nodded several times to the conductor, who was stationed on the rear platform of the car; that he seemed to be engaged looking through a window on the rear platform; that she then got up out of her seat and went to the rear platform, and as she approached the conductor she said "Springfield avenue"; that he immediately rang the signal bell, and that when the car had reached a point 200 feet east of Springfield avenue it suddenly jolted and jerked, and she, the plaintiff, was thrown from the platform onto the ground and northward a distance of about 10 feet.

There is some dispute in the evidence as to how fast the car was going just before the accident occurred. Plaintiff fixed the speed at about 20 miles an hour; the conductor said it was going 12 to 15 miles an hour; and the motorman testified that it was going pretty close to full speed. We think it may fairly be concluded from the evidence that the car was going at a rapid rate of speed immediately before the accident happened. The car in question was one of the small, older types of street cars.

A police officer testified that he aided in carrying the plaintiff from the scene of the accident immediately after its occurrence; that he found her lying north of the north or westbound track,at a point 75 or 100 feet west of Avers avenue, or, as he stated on cross-examination,100 feet east of Springfield avenue, "or more than that"; that the car stopped after the accident at a point about 200 feet from where plaintiff was

lying, and west of Springfield avenue; that the distance between Springfield and Avers avenues is about 300 feet.

The motorman of the car testified that he received a signal bell to stop when he was about 50 feet west of Avers avenue; that he was then about 275 feet from Springfield avenue; that he did nothing to stop the car until he received an emergency signal, three bells, to stop; that he then applied his brakes; that his car stopped about 75 feet east of Springfield avenue.

The conductor testified that he was on the back platform of the car and facing west as the car approached the place where the accident happened; that he did not see the plaintiff when she got on the car about one block east of the place of the accident, and that there were only three or four passengers on his car at that time; that when the car was a few feet west of Avers avenue the plaintiff came towards the rear of the car; that as she did so he, the conductor, gave the motorman the signal to stop; that the plaintiff continued walking towards the rear of the car, then faced north and went off the car; that she did not stop on the rear platform at all; that he tried to stop her but did not have time to do so.

A passenger who was seated in the car near the rear platform testified that he saw the plaintiff leave her seat and approach the platform; that "she was off the car so quick she couldn't hardly have made a stop there."

The above is substantially all the testimony introduced on the trial with relation to the occurrence itself. Both the conductor and the passenger referred to testified that the car did not give a lurch or jerk just before the accident happened, and in this particular their testimony is directly contradictory to that of the plaintiff. The testimony of the passenger witness, however, can hardly be regarded as reliable

as to what occurred on the platform immediately before the accident; he was seated in the car, three or four seats from the rear platform, and it is gathered from his testimony that he did not in fact see or know just what happened on the rear platform at the moment and just before the occurrence in question. We think there is evidence in the record from which the jury were authorized to find the facts as narrated by the plaintiff, who was the only witness testifying on her behalf, with reference to the accident which caused the injuries she complains of. The conductor and the plaintiff directly contradict each other as to just what did happen at the time she fell from the car. She says her fall was caused by the jerking and jolting of the car; the conductor testified that notwithstanding that the car was going at the rate of 12 or 15 miles an hour or faster, the plaintiff deliberately walked off the rear platform, in about the middle of the block between Springfield avenue and Avers avenue. The jury had an opportunity to see and hear these two witnesses, to judge of their credibility and to determine the reasonableness of the testimony of each; and we think it might fairly be argued to the jury that the version of the plaintiff was the more reasonable of the two. There was no sufficient reason why she should walk from the rear platform of the car at the time in question. Her home was on Springfield avenue, west of the scene of the accident. Both she and the conductor agree that the signal to stop at Springfield avenue was given to the motorman, and the police officer testified that the car in fact did stop 75 feet east of Springfield avenue. We are inclined to the view that on the whole evidence the questions of fact were fairly submitted to the jury, and that there was sufficient evidence to warrant the verdict in favor of the plaintiff.

verdict in favor of the plaintiff.

It is urged that the verdict is excessive. The evidence shows that as a result of her fall the plaintiff sustained a fracture of her left arm; that immediately following the accident two or three efforts were made to set the arm by the family physician and a specialist who was called in to attend the plaintiff; but that these efforts resulted in failure; that three or four days thereafter an X-ray picture was taken of the injured arm, and that on the 11th day of July plaintiff was admitted to a hospital, where she underwent an operation and remained for eleven days; that thereafter her arm was kept in a cast for five weeks, and later carried in a sling; that in April, 1912, she attempted to resume her work - that of stenographer and bookkeeper - but was unable to do so because of soreness in her arm. Plaintiff testified that she was unable to do any work, except for two weeks' employment in April, 1912, until September, 1913; that at the time of the trial, six years after the accident happened, she was unable to lift her arm above her shoulder, and that the movement of the arm was restricted. Two doctors testified that this condition of the arm is permanent. In describing the injuries plaintiff sustained a doctor testified that the head of the humerus was drawn from its socket, and that there was also a fracture of the humerus, the head being entirely broken off. Dr. Ryan, a surgeon who performed the operation on plaintiff while she was at the hospital, testified that he had to open the joint in order to get the head of the humerus back into position; that in setting the fractured bone it was necessary to join the fragments together by a long joiner-screw, approximately four inches long. The evidence tends to show that the left arm at the time of the trial was shorter and otherwise smaller than the right arm; that there was atrophy of the muscles, which is permanent. On the first trial the jury rendered a

verdict in favor of plaintiff for $5,000, and on this trial the verdict was for $6,400. While we are inclined to believe that the verdict here is high, we are not convinced that its amount indicates that it was the result of undue passion, prejudice or sympathy on the part of the jury. If the injuries which plaintiff sustained were in fact such as were testified to by her and her doctors, she must necessarily have suffered much pain therefrom. If the testimony of plaintiff be true, she has lost a considerable sum in her efforts to be cured of her injuries, and from her inability to follow her usual occupation. The evidence tends to show that to some extent the injuries complained of are permanent.

No other errors are complained of than those above indicated, and we think that on the whole record the judgment of the Circuit Court should be affirmed.

AFFIRMED.

361 - 22795

WILLIAM R. BRAND, doing business as Brand Agency,
Appellant,
vs.
JAMES P. YOUNGER,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 437

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On July 23, 1904, plaintiff, as the Brand Agency, entered into the contract following with the defendant:

"It is hereby agreed that J. P. Younger has given the following accounts to the Brand Agency for collection. J. P. Younger against Union Provision Co., $566.92; James P. Younger against A. Sutter, $475.20; J. P. Younger against J. Boyer, $280.93; J. P. Younger against the Elgin Supply Co. for $125.50 and J. P. Younger against W. L. Clute for $1,963.92.

"It is agreed that the said Brand Agency shall receive for its services all the proceeds collected from the claim against J. Boyer aforesaid, after which the proceeds from all the others of above accounts shall be divided as follows:

"The first $100 shall be paid to James P. Younger after which the balance of the proceeds excepting the Boyer account shall be divided in two even parts between James P. Younger and the Brand Agency. The said Brand Agency is authorized to compromise accounts if necessary or it may deem advisable.

(Signed) JAMES P. YOUNGER,
WILLIAM R. BRAND,
For the Brand Agency."

Suit was begun by plaintiff in the Municipal Court on September 30, 1914, against the defendant to recover the sum of $931.96, which plaintiff alleges accrued to him under the above contract. The case was tried with a jury; the verdict and judgment of the court were in favor of the defendant.

The evidence heard on the trial was in direct conflict with reference to two material questions of fact

in dispute between the parties. The defendant, whose testimony is corroborated by that of his son, asserted that he had within six weeks after the execution of the above contract informed the plaintiff that he, the defendant, had "withdrawn the collection" of the claims referred to in the above contract, and that he would have nothing more to do with the plaintiff "in any shape, form or manner." This notice and conversation were denied by the plaintiff.

It is conceded that the claims referred to in the contract were not in fact collected for a period of about ten years after the contract was entered into. There is ample evidence in the record to sustain the position of the defendant that he had severed his contracual relations with the plaintiff a short time after the contract was made; but even if this were not so we think the evidence is sufficient to sustain the verdict of the jury and the judgment of the court, for the reason that under the evidence the jury were warranted in finding that the plaintiff did not collect or aid in collecting the Clute account, which is the basis of plaintiff's claim against the defendant. The evidence heard on the trial shows that this account was collected ten years after the contract was entered into and through the efforts of another attorney employed by the defendant. Plaintiff did testify that he had made visits to Albany in his effort to collect this claim, and he asserts that in so doing he necessarily expended a considerable sum of money.

The contract in question provided for the collection by plaintiff of five different accounts; this contract was made in 1904. Plaintiff never reported during all these years that he had collected any of the accounts

in question excepting the Boyer account, as to which plaintiff kept, as he was entitled to do, all of the amount collected thereon. As to the others, amounting in all to more than $3,000, he made no report of any sort to the defendant, and we think it may fairly be held that, as a result of this conduct, the defendant was authorized to assume that plaintiff had abandoned the contract in question and any rights which he might originally have asserted thereunder. It cannot be said that the contract in its form was an assignment of the accounts in question; it was, in its essence, merely a contract of employment.

> "While it is true that a client cannot rescind, at discretion, a special contract with his attorney, yet it results, from its very nature, that he may do so if the attorney fails to use reasonable diligence in the performance of his part of the undertaking."
> Walsh et al. v. Shumway, 65 Ill. 472.

> "If an agent or attorney, having undertaken to collect a debt for a certain share of what he may recover, finally abandons further effort as useless, and at a subsequent period, the principal receives payment through new instrumentalities, or from causes with which the agent has no connection, the latter cannot claim the share to which his contract would have entitled him if payment had been secured by his own efforts."
> Scoville v. Trustees, etc., 65 Ill. 523.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

424 - 22858

THE CURTIS PUBLISHING COMPANY,
a corporation,
Appellant,

vs.

THE CITY OF CHICAGO,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 438

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, The Curtis Publishing Company, a New Jersey corporation, filed its bill of complaint in the Superior Court against the defendant, City of Chicago, in which bill it prayed that the City and its officers be enjoined from interfering with the exhibition and sale of the "Saturday Evening Post" upon sidewalk news-stands, and for a decree declaring the ordinances in part invalid under which permits were issued for the erection and maintenance of such stands. A temporary injunction was granted, and upon demurrer by the defendant, the injunction was dissolved and the bill dismissed for want of equity. Complainant appealed from the decree of the Superior Court to the Supreme Court of the State of Illinois, and that court, holding that the case did not involve a consideration of the validity or constitutionality of the said ordinances, transferred the case to this court.

The material allegations of the bill of complaint, including the ordinances in question, are sufficiently set forth in the opinion of the Supreme Court, and reference is hereby made to that opinion, which is reported in volume 273 of the Illinois Reports, at page 373. Following a statement of the material allegations of the bill, the Supreme Court said:

the Supreme Court said:

> The material allegations of the bill, treating as statements of fact the averments of the demurrer, are substantially these: Complainant is a citizen of Illinois, and files this bill on behalf of himself and all other citizens and taxpayers of the city of Chicago who may come in to contribute to the maintenance of the public parks of that city. The defendants are the commissioners of the South Park District, a municipal corporation created by and existing under an act of the legislature of Illinois, approved May 29, 1869, and in force July 1, 1869. (Laws 1869, p. 294.) The bill alleges that the board of commissioners, pursuant to the powers conferred upon them by the act, have selected and laid out certain grounds, submerged lands in the waters of Lake Michigan, adjacent to the shore of the city, and have begun to construct thereon an immense inclosure, filling in the same with earth taken from the bed of the lake, and have commenced the erection of extensive buildings thereon for the purpose of establishing and maintaining a public park for the recreation and instruction of the people of the city and the public generally. The bill further alleges that the defendant railroad company, pursuant to the provisions of an act of the legislature of Illinois, approved April 16, 1869, and in force July 1, 1869, (Laws 1869, p. 270,) has constructed its railroad and depot grounds upon the lands under the waters of the lake, lying between the line of the shore of the city and the inclosure of the commissioners, and has filled in the same with earth taken from the bed of the lake, and has erected thereon a depot and other buildings, and has constructed its railroad thereon, and has commenced to run its trains of cars thereon, and that the defendant railroad company threatens to continue the construction of its railroad upon the lands aforesaid, and to run its trains of cars thereon, and to erect other buildings thereon, and to do other acts in the prosecution of its business, which will result in the destruction of the inclosure and the public park of complainant and the public generally, and will result in the destruction of the property of complainant and the public generally, and will result in the destruction of the property of complainant and the public generally.

"We have no jurisdiction to entertain this appeal. The constitutional questions upon which our jurisdiction depends are not involved in this record. On the oral argument counsel for each party conceded that the city had the power to pass an ordinance permitting the erection of stands on the streets for the sale of newspapers. If this particular ordinance is within the power of the city to enact and is constitutional, it confers no right upon the appellant to have its paper exhibited and sold on news-stands, the appellant is not entitled to relief and its bill was properly dismissed. If it is not within the power of the city to enact or is unconstitutional, then it confers no right upon the appellant to have its paper exhibited and sold on news-stands and confers no right upon any person, the complainant is not entitled to relief and its bill was properly dismissed. In either event the appellant has no right to have its paper sold from stands erected in the street and is not entitled to an injunction restraining the city from interfering with such sales. Whether it may have the right to restrain the city from permitting sales of other papers from news-stands in the street from which it excludes the appellant's paper is a question which the bill does not seek to raise. There is no question involved in the suit calling for a decision upon the validity of the ordinance, and as its validity does not in any manner affect the rights of the complainant to the relief prayed for, it is not involved. (Village of Morgan Park v. Knopf, 199 Ill. 444.) A constitutional question will not be considered in a case in which its decision can have no effect upon the decree which is the subject of review. Illinois Central Railroad Co. v. Chicago and Great Western Railway Co., 246 Ill. 620; Rittenhouse & Embree Co. v. Brown & Co., 254 id. 549.

The cause will be transferred to the Appellate Court for the First District."

In view of the foregoing opinion of the Supreme Court the decree of the Superior Court must be affirmed.

It was conceded on oral argument in the Supreme Court by counsel for each of the parties that the City had power to pass an ordinance permitting erection on the streets of the stands in question; the same position was taken by counsel for both parties on oral argument in this court. There is, then, no question of power or lack of power in the city council to pass the ordinances involved in this suit, except that counsel for complainant urges that these ordinances are in part invalid because, first, they attempt, illegally, to vest a discretionary power in the commissioner of public works; and, secondly, that the city council had no

"We have no jurisdiction to entertain this

power to limit the use of such stands to daily newspapers published in the city of Chicago only, and that, as we understand the argument, we should strike out of the ordinances this limiting language and insert in lieu thereof "all newspapers."

The identical questions presented by counsel in their briefs filed in the Supreme Court are presented to us for determination; in fact, copies of the briefs prepared for and filed in the Supreme Court have been filed by the parties in this court.

In our opinion no question is presented to us by counsel for complainant that does not, in some measure at least, involve a consideration of the validity of the ordinances in question. If it is intended by counsel that this court should merely construe the ordinances, then we are able to afford the complainant no relief, for the reason that we cannot by construction read into the ordinances language which we have no reason to believe would in any sense express the intention of the city council when such ordinances were adopted. We have no jurisdiction to pass upon the total validity of these ordinances, and that being so we are unable to see how it can be held that we have any power to pass upon their partial validity; and, as we understand the briefs of counsel for complainant, no other questions are presented to us for decision. The Supreme Court in its opinion holds that "a constitutional question will not be considered in a case in which its decision can have no effect upon the decree which is the subject of review."

We are unable to so construe these ordinances as to give to complainant the relief which it seeks by its

bill, and we have no jurisdiction to pass upon, either the total or partial validity of the ordinances in question.

The decree of the Superior Court will be affirmed.

AFFIRMED.

219 -.22172

MARIE WALLER,
Defendant in Error,

vs.

W. J. RICHTER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 440

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ of error seeks review of a judgment entered in favor of the plaintiff below in default for want of an affidavit of merits.

The claim was for rent alleged to be due and unpaid for the month of September, 1915, for premises occupied by the defendant under a tenancy from month to month, and it was alleged that defendant vacated the premises on the 30th day of August, 1915, without giving plaintiff, the landlord, necessary notice to terminate such tenancy. Defendant's affidavits of merits were stricken. The last amended affidavit of merits was to the effect that defendant did notify plaintiff during said month of August that he would vacate the premises at the expiration of said month, in other words, less than thirty days notice.

Only two points are argued in plaintiff in error's briefs - one, that the statement of claim did not state a cause of action and that his motion to strike the same should have been allowed. The claim was in substance as above stated and sufficient, in our opinion, to state the general nature of the cause of action and to meet the re-

Mr. J. Simmons,
Parliament Street,
Toronto 10.

Dear Sir,

Re: Published Article

Thank you for your letter of the 4th inst.

This suit of mine against Messrs. Jackson & Jackson
of
entered in favour of the plaintiff before the default for want
of my affidavit of merits.

The claim was for rent alleged to be due and no-
thing for the month of September, 1911, for premises occupied
by the defendant under a tenancy from month to month, and
it was stated that defendant vacated the premises on the 30th
day of August, 1911, without giving plaintiff, the landlord,
necessary notice to terminate such tenancy. Defendant's
affidavit of merits was to the effect that defendant did
allege that he was to the effect that he had
agreed to pay the rent monthly in advance, in other
words, that the tenancy was not a monthly one, but
there was no agreement as to how long the tenancy was to
continue. The case was in chambers to
before the Master in Ordinary, in order
that the defendant might be examined upon his affidavit of
merits, that upon the examination of which did not appear a
single - was, that the plaintiff in effect's
agent had been allowed to remain in possession of the
premises for a month after the 30th August, 1911, and
that defendant had paid the rent for that month.

Yours truly,

quirements of the Municipal Court Act.

The other point is that no notice whatever is required from a tenant from month to month to terminate his tenancy. This same point has been before this court on several occasions and it has been uniformly held that a landlord is entitled to thirty days' notice from a tenant from month to month when the latter desires to terminate his tenancy. Eberlein v. Abel, 10 Ill. App. 626; Machbour v. Weiner, 34 id. 237; Donohue v. Chicago Bank Note Co., 37 id. 552; Weber v. Powers, 114 id. 411. The plaintiff in error argues that these cases do not directly decide the question and that the expressed views of the court thereon are obiter dictum. We do not agree with this contention and see no sufficient reason for departing from the views of the court as expressed in those decisions upon this question to the effect that such a notice on part of the tenant is requisite to the termination of such a tenancy by him. We think the court properly refused to strike the statement of claim and properly struck the affidavits of merits. Accordingly the judgment will be affirmed.

AFFIRMED.

judgment of the lower court.

The other point is that no notice whatever is required from a tenant from month to month to terminate his tenancy. This same point has been before this court on several occasions and it has been uniformly held that a landlord is entitled to thirty days' notice from a tenant from month to month when the latter desires to terminate his tenancy. Durflein v. Abel, 16 Ill. App. 626; Pendleton v. Leiper, 94 Ill. 175; Cowles v. Chicago Real Estate Co., 87 Ill. 348; Yeiser v. Lipsey, 114 Ill. App. 414. The plaintiff in error argues that there cases is not directly decide the question and that the expressed views of the court therein are obiter dictum. We do not agree with this contention and see no sufficient reason for departing from the views of the court as expressed in these decisions upon this question to the effect that such a notice on part of the tenant is requisite to the termination of such a tenancy by him. We think the court properly refused to strike the statement of claim and properly struck the affidavit of merits. Accordingly the judgment will be affirmed.

Affirmed.

239 - 22193

MICHELE CONSIGLIO,
Defendant in Error,

vs.

EMILIO LONGHI, doing business as the Italian & Greek Product Company,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 441

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was an action brought on a promissory note for $400, of which the defendant (plaintiff in error) was maker, and one Gnarro, payee, Consiglio (the plaintiff) claimed to be an innocent holder thereof for value without notice. The note was dated March 22, 1914, and was payable "after date". Expressing as it did no time for payment it was payable on demand. (Negotiable Instrument Act, Art. 1, sec. 7, Ch. 98 R. S.)

The defense in substance was that the note was given for a deposit of $400 made by Gnarro with defendant to secure the latter against loss in the accounts of merchandise sold for defendant by Gnarro on credit, that the accounts were guaranteed by Gnarro and proved worthless, that the loss exceeded the amount of the note, and that the plaintiff did not become owner thereof until long after maturity.

The note bore these endorsements: "Interest Paid up to March 22, 1915"; "Pay to the order of Mrs. Fortuna Gnarro, Ed. M. Gnarro"; "Pay to the order of Michele Consiglio, Fortuna Gnarro". Defendant introduced evidence to

The plaintiff did not become owner thereof until long after maturity.

The note bore these endorsements: "Interest paid up to March 23, 1915"; "Pay to the order of Wm. Portman Duarte, Jr. M. Duarte"; "Pay to the order of Nicholas Consiglio, Attorney Duarte." Defendant introduced evidence to prove that the loan exceeded the amount of the note, and that accounts were examined by Duarte and proved worthless, amounting for a deposit of $400 made by Duarte with defendant to secure the latter against loss in the accounts of merchandise sold for defendant by Duarte on credit, that the note was given for said deposit, and that the plaintiff did not become owner thereof until long after maturity.

The defense in substance was that the note was given for a deposit of $400 made by Duarte with defendant to secure the latter against loss in the accounts of merchandise sold for defendant by Duarte on credit, that the accounts were examined by Duarte and proved worthless, and that the loss exceeded the amount of the note, and that for $400, or words the defendant (plaintiff in error) was maker, and one Duarte, payee, Consiglio (the plaintiff) claimed to be an innocent holder thereof for value without notice. The note was dated March 23, 1914, and was payable "after date". Explaining as it did no time for payment it was payable on demand. (Negotiable Instruments Act, art. I, sec. 7, p. 98 L. e.)

the effect that the note was in Mrs. Gnarro's possession when the interest was paid, and offered to prove by the maker that later in June, 1915, she presented the note to him for payment, that it had not then been endorsed by the payee, that he then informed her that Gnarro was indebted to him in excess of the amount of the note and he would not pay it, and that the endorsements aforesaid were made subsequent to that time. The court sustained an objection to a question designed to call out such proof, but in response to said offer, without hearing the witness, said it would consider the evidence subject to the objection and then found for the plaintiff.

These provisions in Article IV of the Negotiable Instrument Act are pertinent: "Where an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder is not deemed a holder in due course" (Sec. 53). "In the hands of any holder other than the holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable" (Sec. 58). "When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course" (Sec, 59).

In view of these provisions the offered evidence, which the court evidently regarded as immaterial, should have been received, and accordingly the judgment will be reversed and the cause remanded for a new trial so that an opportunity may be given to present the real facts.

REVERSED AND REMANDED.

269 - 22223

205 I.A. 443

CATHERINE CRONIN, Defendant in Error,

vs.

COURT OF MINOR, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In this cause we have nothing before us but the common law record, the stenographic report having heretofore been stricken. None of the original assignments of errors is open for consideration as they relate to that part of the record so stricken. Plaintiff in error, however, was permitted to assign as an additional error that the statement of claim filed in the trial court does not state a legal cause of action. But as the statement of claim is not abstracted, observing the rule followed in this court and most appellate tribunals, we shall not go to the record to ascertain what it contains. There being nothing before us open to review the judgment of the court below will accordingly be affirmed.

AFFIRMED.

411 - 22366

205 I.A. 450

NORTHERN TRUST COMPANY as Administrator to collect of the Estate of WILLIAM HENRY McDOEL, Deceased,

Appellee,

vs.

LEWIS W. PARKER,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a bill to foreclose a trust deed dated July 1, 1909, given to secure appellant's promissory notes to his own order, for the payment of six of which for $2000 each and interest, he was in default. They were endorsed over and delivered to McDoel (for whom appellee was substituted as complainant after his death). These notes represented the price of shares of stock in a coal company that said McDoel had been interested in promoting, and were given to take up notes given in 1906. Appellant pleaded a want of consideration and claimed and testified that McDoel had promised him such stock in July, 1903, in consideration of his subscribing for other stock of said corporation. The main issue of fact is whether such a promise was made.

In April, 1915, McDoel requested of Parker a statement of their mutual accounts and the next day Parker wrote him saying in substance that his only indebtedness to McDoel was on the six promissory notes of $2000 and interest thereon from January 1915, and asked for further indulgence. In explanation of this acknowledgment Parker testified that because of family relations and inducements held out by

[illegible]

[illegible]

[illegible]

McDoel, he had refrained from asking McDoel for a statement of the stock transaction as well as of other matters. McDoel testified that he did not recollect, and, in fact, did not have, such conversations as Parker claimed with reference to such stock. There was a direct conflict of testimony on this question, and it is argued on this appeal that in view of Parker's long and intimate business and personal relationship with McDoel, his uncle, who was then seventy four years of age, he avoided an issue with him at that time, and because McDoel's memory would be naturally failing at his age his testimony is not as convincing, explicit and reliable as Parker's, and therefore we should reverse the decree approving the master's finding, which, though not specific as to the making of such promise, necessarily involved its determination.

The affirmative of the contention that said notes were without consideration was with Parker. McDoel, whose memory we can not assume was impaired to the extent of being wholly unreliable, not only disclaimed a recollection of conversations as to the stock which Parker claimed to have had with him nearly twelve years previous, but flatly denied having them. In view of such conflict of testimony and Parker's acknowledgment of the debt as late as the year the suit was brought, and his paying interest on said notes for several years without allusion to such promise, we can not say that the master was not justified in finding in effect that Parker's defense was not affirmatively established. What was said in Broughton v. Smart, 59 Ill. 440, is pertinent to this state of the record, namely:

> "A party, holding the affirmative of a proposition, is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other."

But it becomes necessary to reverse the decree for other reasons. Four of the notes secured by the trust deed were paid. There was a provision in the trust deed that upon the payment of any one of the principal notes the trustee might release one lot. Accordingly four lots were released, two of which were sold by Parker to a man named Torup, who in turn sold the same to Margaret Garvin and Jennie Kelley. The release of these lots was pleaded in defendant's answer. Kelley and Garvin obtained leave to file an answer and cross bill, (which were later amended) and a reference to a master was had on the issues formed thereon between McDoel and said Kelley and Garvin, to which Parker was not a party and which were ultimately decided against McDoel. Parker, however, was taxed with the whole of the master's fee which included taking the testimony upon such issues. This we think was improper.

The trust deed provided for solicitors' fees incurred in any suit or proceeding in connection with the foreclosure to which the holder of the notes might be a party, and the decree allows a solicitor's fee of $1200. Experts were called to testify as to their value. The services testified to included those rendered in connection with the Garvin and Kelley cross bill to which appellant was not a party. Such services did not come within the purview of the language in the trust deed. The value of the services of the solicitor in connection with the foreclosure proceedings to which appellant was a party including those rendered in connection with proceedings had under appellant's cross bill, should be determined and the costs should be retaxed in conformity to the views herein expressed.

It is conceded that there was a mistake made in duplicating interest to the extent of $70, which appellee

offere to remit. This can be corrected in the entry of a new decree. The decree will accordingly be reversed and the cause remanded for such proceedings as are necessary to carry out the views herein expressed.

REVERSED AND REMANDED.

454 - 22409

EMILY J. CRONIN and
JOHN F. KELLY,
Appellees,

vs.

GUSTAVUS J. TATGE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 452

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question involved on this appeal is whether or not Section 1 of the Mechanic's Lien Act of 1903, (p. 1655, Hurd's R. S. 1916) gives a lien on a lot for work done under contract with the owner of the lot, in paving a street in front of it and providing and arranging for laying the water and gas mains therein, and for the laying of the sewer and sewer connections therewith and extending the same inside the sidewalk line, and for constructing a sidewalk, all in front of the lot in question. The decree appealed from held that the contractor is entitled to such a lien. No question is raised except as to the construction of the statute. Eliminating the unnecessary portions of the section in question it reads in its grammatical construction as follows:

> "That any person who shall by any contract * * * with the owner of a lot * * * furnish material * * * for the purpose of, or in the building, altering * * * any house * * * or sidewalk, whether such walk or sidewalk be on the land or bordering thereon, * * * or improvement, or appurtenances thereto on such lot * * * or connected therewith, and upon, over or under a sidewalk, street or alley adjoining; * * * shall have a lien upon the whole of such lot * * * and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises," etc.

2052 U.S. 452

DEFINING THE OPINION OF THE COURT.

Mr. Justice DAVIES

The only question involved on this appeal is whether or not section 7 of the Mechanic's Lien Act of 1896, (b. 1898, Dom's C. 1911) gives a lien on a lot for work done under contract with the owner of the lot, in favour of a client in favour of it and providing and retained for taking the notice and the notice Charlie, and for the laying of the sewer and sewer connections thereto, and for completing a sidewalk, all in front of the lot in question. The decree appealed from held that the contract is entire and not severable, and that the appellant could not recover anything for the work done. The question is raised except as to the construction of the statute. Diametrical the appellant's solicitor that the decree is wrong in law and should be varied so as to give a lien. We question is raised the appellant's solicitor that the decree is wrong in law and should be varied so as to give a lien. We question is raised except as to the construction of the statute. Diametrical

Or, further abbrevating the same for still greater lucidity it reads:

> "Any person who shall by any contract * * * with the owner of a lot * * * furnish material * * * in building * * * a sidewalk * * * bordering thereon * * * or improvement * * * upon, over or under a sidewalk, street * * * adjoining; shall" etc.

Thus read the grammatical construction is more apparent, and a clear intention made manifest to give a lien on a lot for work done in the performance of a contract for paving an adjoining street, or building a sidewalk bordering thereon, or laying gas mains or sewers connected with the use of the lot or a building thereon. We think the conjunction "and" beginning the clause "and upon, over or under a sidewalk" should be construed as "or", and the prepositional clause should be read as modifying either the word "improvement" or "appurtenances". Thus read we find no difficulty in arriving at either the grammatical construction or intent of the act.

Appellant refers to the decision in Smith v. Kennedy, 89 Ill. 485, construing somewhat similar language in the Act of 1874. It was there held that a lien under the Act of 1874 was restricted to work done on a building or appurtenances thereto. In that case there was no building. Evidently the change of language in the statute of 1903 was intended to remove the ambiguity and uncertainty of the language in the Act of 1874, construed in the Kennedy case. We think the decree should be affirmed.

AFFIRMED.

Or, during [illegible] the sum for ally Greater Toronto

it reads:

"Any person who signs [illegible]
in petition [illegible] material [illegible]
[illegible] or [illegible] each or both [illegible]
[illegible] shall [illegible]; wrong" etc.

Thus read the grammatical construction is more

apparent, and a clear intention does emerge to give a fine

or a jail for wrong-doing to the petitioner or a contract for

having an objecting client, or writing a client pertaining

thereon, or [illegible] the means or manner connected with the use

of the law or a polling checker. We think the conjunction

"and" [illegible] the clause "and does", does or makes a right-

mark, should be construed as "or", and the disjunctive

clause might be read as modifying either the word "[illegible]-

ment" or "advertisement". Thus read we find in direct

it entirely to either the grammatical construction or intent

of the act.

Compare rules to the contrary in Smith v. Jeffrey,

82 [illegible]. 422, construing contrary language to the act of

1871. It can be seen that a fine under the act of 1871 was

restricted to acts done on a petition or indorsement merely.

In West York there was no petition. Actually the charge at

[illegible] was in the statute of Ontario re Canada the

[illegible] and [illegible] of the [illegible] to the [illegible] of 1871,

be altered.

[illegible].

374 - 22429

EMMA VAN ZANDT,
Appellee,

vs.

THE METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 453

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This suit is based upon the contractual obligation a common carrier is under to its passengers. It was claimed by appellee (plaintiff below) that while she was a passenger in one of appellant's cars she was injured by the falling of a substance or object, the result of the latter's failure to use ordinary care in inspecting the equipment and appliances of said car. The burden of proving such claim rested, of course, with plaintiff. It was her theory that the object which struck her in the forehead while she was sitting in the car was a part of the metal fixture or arm to one of the ventilators inside and near the top of the side of the car. Defendant's theory was that it came from outside of the car. Unfortunately the object was never found, defendant's daughter claiming that she saw it on the seat right after it fell, and the conductor claiming that he failed to find it in his search immediately afterwards.

Appellant contends that the verdict is manifestly against the weight of the evidence, and we think it is. There

MARY ANN SMITH,

Appellee,

vs.

NORTHERN COUNT

OF CLOVOO.

THE MISSOURI-KANSAS-TEXAS RAIL

RELATED RAILROAD COMPANY,

Appellant.

MR. PRESIDING JUSTICE MACNAB

DELIVERED THE OPINION OF THE COURT.

This suit is based upon the contractual obligation a common carrier is under to its passengers. It was claimed by Appellee (plaintiff below) that while she was a passenger in one of appellant's cars she was injured by the falling of a substance or object, the result of the latter's failure to use ordinary care in keeping the equipment and appliances of said car. The burden of proving such claim rested, of course, with plaintiff. It was her theory that the object which struck her in the forehead while she was sitting in the car was a part of the metal fixture or arm to one of the ventilators inside and near the top of the side of the car. Defendant's theory was that it came from outside of the car. Unfortunately the object was never found, defendant's daughter claiming that she saw it on the seat right after it fell, and the conductor claiming that he failed to find it in his search immediately afterwards.

Appellant contends that the verdict is manifestly against the weight of the evidence, and we think it has. There

was but one witness on each side who testified to seeing the object, plaintiff's daughter for the plaintiff, and another passenger for the defendant. Plaintiff and her daughter sat in a cross-seat facing forward on the right-hand side of the car, the former by the aisle, the latter by the window. In front of them was an empty seat facing toward them. Extending therefrom longitudinally along the side to the front of the car was a seat in which defendant's witness sat, resting his right arm on the window sill and facing towards the front of the car and a person with whom he was conversing. He was from four to ten feet in front of plaintiff, according to the varying testimony. He said that the object passed swiftly by his face from an open window towards plaintiff. Her daughter also testified that she saw it "pass the man's head", thus corroborating him in the material fact that it came from a distance and direction which tend to refute the theory of plaintiff that the object fell from a ventilator above her head. If the object passed in front of his face, as the evidence on both sides indicates, it had to go in almost a horizontal line for several feet to strike plaintiff in the forehead. That the object should fall from a ventilator as far away as the man was, pass his head and then strike her in the forehead is contrary to physical laws. While the daughter testified that she "saw it come from overhead" and that "one of the arms that stick out of the ventilator was gone" yet not only is such testimony inconsistent with the object both falling "from overhead" and passing the man's face so as to strike plaintiff's face at the distance she was away from him, but at a previous trial she testified "I could not tell just what it was that struck her and do not know where it came from". Tending further to weaken the value of her testimony apparently to enhance the amount of damages

of her testimony apparently to minimize the amount of damages
do not know where it came from". Testing further to weaken the
testified "I could not tell just when it was that either her and
distance she was away from him, but at a previous trial she
passing the man's face so as to strike plaintiff's face at the
inconsistent with the object both falling "from overhead" and
out of the ventilator was gone" yet not only is such testimony
one "saw it come from overhead" and "one of the arms that with
and
contrary to physical laws. While the daughter testified that
man was, pass his head and then strike her in the forehead is
the object should fall from a ventilator so far away as the
for several feet to strike plaintiff in the forehead. That
both sides indicates, it had to go in almost a horizontal line
if the object passed in front of his face, as the evidence on
plaintiff that the object fell from a ventilator above her head.
distance and direction which tend to refute the theory of
contemporaneously in the material fact that it came from a
plaintiff was testified that she saw it "pass the man's head", thus
ple face from an open window towards plaintiff. Her daughter
ing testimony. It would that the object passed swiftly by
four to ten feet in front of plaintiff, according to the vary-
the car and a person with whom he was conversing. He was from
right arm on the window sill and facing towards the front of
car was a seat in which defendant's witness sat, testing his
the motion immediately along the side to the front of the
front of them was an empty seat facing toward them. Extending
car, the corner by the aisle, the latter by the window. In
in a cross-seat facing forward on the right-hand side of the
passenger for the defendant. Plaintiff and her daughter sat
object, plaintiff's daughter for the plaintiff, one another
was but one witness on such side who testified to seeing the

sustained by her mother she corroborated her mother's testimony at the trial that the latter had to use glasses after the accident and did not use them before, whereas it appears that at the previous trial the mother herself testified that she had worn glasses all her life. In view of such evidence not only do we think the verdict is manifestly against the weight of the evidence but that the preponderance was decidedly in favor of defendant. The judgment will accordingly be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

360 - 22315

THE BASS FOUNDRY & MACHINE COMPANY, a corporation,
Appellee,

vs.

SULZBERGER & SONS COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 454

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee (plaintiff below), for the contract price of two water heaters. The cause proceeded to a hearing before the court without a jury, and resulted in a judgment for the plaintiff. Defendant by this appeal seeks a review and a reversal of that judgment.

The contract entered into between the parties, consisted of a written proposal from the plaintiff to the defendant, dated April 11, 1913, and defendant's acceptance noted thereon; which contract contained among others, the following clause:

> "Heaters must be guaranteed to contain sufficient square feet of heating surface to heat the required amount of water, namely 120,000 # from 60 degrees F. to 210-220 degrees F. with 5# Back-pressure in Exhaust steam."

These heaters were operated in connection with defendant's boilers, for the utilization of exhaust steam, to raise the temperature of the water before it was taken into the boilers, thereby effecting a saving in fuel.

Following the installation of the said heaters in defendant's plant, a test was made as to their heating efficiency, at which time it was discovered that they failed to meet the warranty, and plaintiff was notified thereof.

[illegible]

[illegible]

[illegible]

The trial court held that the foregoing warranty referred only to the workmanship and material furnished by the plaintiff.

The evidence shows that prior to the execution of the contract in question considerable correspondence passed between the parties; that the original specifications required 250 tubes each 10 feet in length, and that at defendant's request these were changed to require 500 tubes each 5 feet in length.

It will be noted that the warranty hereinabove set forth expressly stipulates that the heaters will, when completed, contain sufficient heating surface to heat a specified quantity of water (130,000 lbs.) from 60 degrees to upwards of 210 degrees Fahrenheit. In our opinion, this warranty covers not only the workmanship and materials to be furnished by the plaintiff, but the sufficiency of the specifications as well. (City of Lake View v. MacRitchie, 134 Ill. 203.) The mere fact that certain changes were made in the specifications at the request of defendant prior to the execution of the contract, did not relieve plaintiff from liability under its warranty.

Plaintiff places great reliance in MacKnight Flintic Stone Co. v. Mayor etc. of New York, 54 N. E. Rep. 661, as being opposed to this view. That case is clearly distinguishable from the case at bar.

In the MacKnight case the contract was to furnish only the labor and material specified. All material was subject to the inspection of the city before it was used, and the entire work was done under the direct supervision of the city. The city had practically assumed the responsibility with respect to the sufficiency of its plans and specifications.

Not so, however, in the case at bar, for the evidence shows that the specifications were formulated with the advice and approval of the plaintiff. Furthermore, the court expressly stated in the MacKnight case that its decision was based primarily upon the fact that the contract contained no express warranty with respect to the sufficiency of the plans and specifications; while in the case at bar, there is an express warranty to this effect, as heretofore indicated.

Plaintiff also directs our attention to Conway Co. v. City of Chicago, 274 Ill. 369. It appears from the opinion of the court in that case, that the damage to the street pavement was due to a cause which neither party had in contemplation when the contract was entered into, for which reason the contractor was absolved from liability under the warranty. That case is clearly not in point.

Plaintiff having expressly warranted that the heaters in question would conform to the terms of its contract; and the heaters having failed to fulfill the warranty, it must be held that the trial court erred in excluding defendant's evidence of recoupment, for which reason the judgment must be reversed and the cause remanded.

The measure of defendant's damages is the difference between the value of the heaters furnished by plaintiff, and those required by the contract; or, the cost of altering the defective heaters to make them conform to the warranty, plus a reasonable compensation for their use for the period of time necessary to make the alteration. (Strawn v. Cogswell, 28 Ill. 457.) But if the cost of installing an auxiliary heater would be less than the damages as hereinabove outlined, that method should be adopted in order to minimize them.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

379 - 22334

ANNA KRECUN,
Appellee,

vs.

SAMUEL J. ROSENTHAL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 456

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below), brought an action against the appellant for money had and received. The jury found the issues for the plaintiff, and from the judgment entered thereon, defendant appeals.

It is undisputed that defendant received the money sued for. The evidence submitted on behalf of the plaintiff tended to show that the money in question ($1,750) was, at defendant's request, entrusted to him for safe-keeping while plaintiff's husband was going through bankruptcy. Defendant, on the other hand, adduced countervailing evidence to the effect that this money was paid him in payment of a debt owing to him by the plaintiff's husband. The jury having found for the plaintiff, they evidently attached the greater weight to her case; and in view of the conflicting character of the evidence on this question, we cannot say that such finding was clearly and manifestly against the weight of the evidence.

It is also urged that plaintiff cannot maintain her action because of the fact that her mother was the owner of the money sued for. The ownership of the money is immaterial. If, as the jury found, the plaintiff turned

this money over to the defendant for safe-keeping, defendant can not now question her title thereto. Such question can be raised only by the equitable owner. C. & A. R. R. Co. v. Shea, 66 Ill. 471.

Finally, it is contended that the jury were erroneously instructed. After a careful examination of the entire charge to the jury, we are of the opinion that this objection is without merit.

Finding no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

this money over to the defendant for safe-keeping, defendant
can not now question her title thereto. Same question can
be raised only by the equitable owner. 2. 8 W. 2. 2. 2. 10.
A. Dyce, 66 Ill. 471.

Finally, it is contended that the jury were
erroneously instructed. After a careful examination of the
entire charge to the jury, we are of the opinion that this
objection is without merit.

Finding no error in the record which justifies
a reversal, the judgment will be affirmed.

AFFIRMED.

388 - 22343

STEPHEN J. NAPIERALSKI and
DR. EMMANUEL F. NAPIERALSKI,
Appellants,

vs.

ALBAUGH-DOVER COMPANY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 457

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below), recovered a judgment against the defendants for $2,114.20 on what purported to be their two joint promissory notes.

Defendant Stephen J. Napieralski, in his affidavit of merits, alleged that the notes in question were given to plaintiff as accommodation paper, and also that there was due from the plaintiff to him a sum in excess of the amount alleged to be due on said notes, for commissions earned.

Defendant, Dr. Napieralski, in his affidavit of merits also alleged that the notes in question were given to the plaintiff as accommodation paper, and that he signed them as surety; that he received no notice of dishonor at their maturity, and that hence he was released from liability.

Upon the trial, defendants introduced evidence tending to show that at the time of the execution of the notes in question, an officer of the plaintiff informed them that defendant Stephen J. Napieralski had then, or would have by the time the notes matured, a sum due him for commissions, in excess of the amount due on said notes. This alleged statement was denied by plaintiff, and there is no evidence in the record showing that any specific amount was

[illegible]

[illegible]

[illegible]

due from plaintiff to the defendant Stephen J. Napieralski as claimed.

Whether or not the notes in question were given as accommodation paper was, under the circumstances, a question of fact for the jury, which was determined adversely to the contention of defendants; and from a careful examination of the record, we are not disposed to disturb such finding.

It is insisted by defendant Dr. Napieralski, that he was merely an indorser of the said notes, and that having received no notice of their dishonor, he was released from liability.

A complete answer to this contention is found in his affidavit of merits, in which he alleged having signed the notes in question as surety, while plaintiff contends that he is a joint maker thereof. Whether Dr. Napieralski was a joint maker or surety is, under the circumstances, immaterial, for in either event he became primarily liable, and the fact that no notice of dishonor was given him in no way affects his liability on the notes.

Defendant Dr. Napieralski also urges that he was released from liability on the said notes because the payment was extended without his knowledge or consent. However, the record is barren of any evidence tending to show that a binding agreement of extension had been entered into, in the absence of which defendant's position is untenable. Crossman v. Wohlleben, 93 Ill. 537.

Objection is also raised to the giving of a certain instruction to the jury. Inasmuch as this objection presupposes that defendant Dr. Napieralski was secondarily liable on the notes in question, and he being primarily liable on the notes, we need give the point no further consideration.

Finding no reversible error in the record, the judgment will be affirmed. AFFIRMED.

435 - 22390

MILLIE REETS LAYDEN,
Appellant,

vs.

GEORGE P. MILLER,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 458

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a bill to enjoin the collection of a judgment entered by the Municipal Court of Chicago. Upon a preliminary hearing the court entered a temporary restraining order, but subsequently, upon motion of the defendant, the injunction was dissolved and the bill of complaint dismissed for want of equity.

The judgment in question was for medical services rendered to the complainant by defendant, who is a physician. The action was originally brought against the complainant and her husband, for $152.00; to which both defendants filed an affidavit of merits denying all liability, but alleging further that the services in question were worth not to exceed $50. On June 24, 1914 a judgment for $50 and costs was entered against both defendants, without a hearing, and the cause continued to October 15, 1914 as to the remainder of the claim.

On July 13, 1914 complainant's husband was killed. When the cause was reached for trial on October 15, on motion of the plaintiff, complainant's husband was dismissed as a defendant, without suggesting his death upon the record,

[illegible] PAXSON,

Appellant,

vs.

[illegible] PAXSON,

Appellee.

Mr. [illegible] the Public Service Commission of the State of [illegible].

This was a bill to enjoin the collection of a judgment entered by the Municipal Court of Chicago. Upon a preliminary hearing the court entered a temporary restraining order, but subsequently, upon motion of the defendant, the injunction was dissolved and the bill of complaint dismissed for want of equity.

The judgment in question was for medical services rendered to the complainant by defendant, who is a physician. The action was originally brought against the complainant and her husband, for $182.00; to which both defendants filed an affidavit of merits denying all liability, but admitting further that the services in question were worth not to exceed $50. On June 11, 1914 a judgment for $50 and costs was entered against both defendants, without a hearing, and the cause continued to October 12, 1914 as to the remainder of the claim.

On July 13, 1914 complainant's husband was killed. Upon the cause was reached for trial on October 12, on motion of the plaintiff, complainant's husband was dismissed as a defendant, without extinguishing his liability upon the record,

and judgment for $102 and costs was entered against the complainant alone.

It is charged in the bill of complaint that the latter judgment was the result of fraud and collusion between counsel for the respective parties; that complainant's counsel had no authority to consent to the entry thereof, and that it was entered without her knowledge.

A hearing was had upon the allegations in the bill, the answer thereto, and several affidavits filed on behalf on each party.

It is contended that the court erred in dismissing the bill of complaint for want of equity.

An examination of the bill of complaint reveals that it charges fraud and collusion of counsel in the procuring of the said judgment for $102 against the complainant, but the bill fails to recite any facts or circumstances from which fraud can be inferred. The conclusion of the pleader is insufficient to support the charge. Unless the bill sets up facts from which fraud can be reasonably inferred, a court of equity has no jurisdiction to set aside a judgment of another court. (Nelson v. Rockwell, 14 Ill. 375; Foote v. Despain, 87 Ill. 28.) The fact that the judgment complained of may have been defective because of alleged irregularities may be taken advantage of on appeal or writ of error.

In our opinion, complainant has failed to set up facts and circumstances which would warrant the intervention of a court of equity. The court therefore properly dismissed the bill for want of equity.

AFFIRMED.

dismissed the bill for want of equity.

[illegible]

[illegible] complainant has failed to set up facts and circumstances which would warrant the intervention of a court of equity. The court chancellors primarily may take cognizance of an appeal or writ of error.

In our opinion, complainant has failed to set up facts and circumstances which would warrant the interposition of a court of equity. The court chancellors primarily may take cognizance of an appeal or writ of error. [illegible] of may have been defective because of clerical irregularities [illegible] 87 Ill. 24.) The fact that the judgment complained [illegible] of equity has no jurisdiction to set aside a judgment of another court. (Tipton v. Caulfield, 14 Ill. 414; Ford v. up facts from which fraud can be reasonably inferred, a court is insufficient to support the charge. Unless the bill sets which fraud can be inferred. The conclusion of the pleader but the bill fails to recite any facts or circumstances from ing of the said judgment for [illegible] explains the complainant, that it charges fraud and collusion of counsel in the proceed- an examination of the bill of complaint reveals the dismissed the bill for want of equity.

It is commended that the court erred in dismissing the bill of complaint for want of equity.

On each party.

the answer thereto, and several affidavits filed on behalf a hearing was had upon the allegations in the bill, was entered without precedent.

had no authority to consent to the entry thereof, and that it counsel for the respective parties; that complainant's counsel later judgment was the result of fraud and collusion between

It is charged in the bill of complaint that the

and judgment for [illegible] and costs was entered against the complainant alone.

466 - 22421

FALLS CITY TANNERY, a corp.,
Appellee,

vs.

W. D. ALLEN MANUFACTURING COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 462

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee brought an action against appellant for a balance alleged to be due upon a shipment of hides. It was alleged by way of defense, that plaintiff had fraudulently treated or "loaded" said hides with a solution of glucose, for the purpose of increasing their weight. The jury found the issues for the plaintiff, assessing its damages in the sum of $3,090.42. Subsequently a remittitur of $713.17 allowed for interest was entered by the plaintiff, whereupon the court entered judgment for $2,377.25, from which judgment defendant prosecutes this appeal.

Several points have been urged as grounds for reversal, but in our view of the case it is necessary to pass upon only one, viz., whether or not the jury were properly instructed.

Our attention is first directed to that part of the charge which informed the jury that:

> "The law presumes that every person transacts business honestly and in good faith, and the burden of proving fraud is on the party who charges fraud. In this case the burden of proving fraud is on the defendant and unless the defendant proves fraud by a clear preponderance of the evidence, you must find a verdict in favor of the plaintiff."

verdict in favor of the plaintiff."

"The law presumes that every person insures
against loss by fire, and the burden is on the
defendant and rebuts the ordinary presumption by a
clear preponderance of the evidence, for mere slight
or partial proof of destruction by fire is not
sufficient to entitle the plaintiff to recover.
Where the proof of destruction by fire is clear and
undisputed, but in any view of the case it is necessary to find
whether only one, or several persons set the fire, more than
one verdict may be rendered on the issue."

Several points have been urged on behalf of the
insurance company which necessitate the reversal of the
judgment for $8,117.28, from which judgment defendant
for interest was entered by the plaintiff, amounting in the
of $8,000.00. Subsequently a remittitur of $117.72 was
leave for the plaintiff, amounting in the
the decision of the
trance or theft, must rise with a cessation of
me urged by way of defense, that
a defense tiled to be due upon a statement of
Whether proof as notice against

This part of the instruction was erroneous in that it assumed that plaintiff had proved its case by a preponderance of the evidence, and also directed a verdict for the plaintiff in the event defendant failed to show fraud on the part of the plaintiff. Plaintiff was required to establish its case by a preponderance of the evidence, regardless of whether or not defendant succeeded in establishing its charge of fraud.

The instruction was also misleading in that it required defendant to prove fraud by a clear preponderance of evidence. This instruction placed upon defendant the burden of establishing its defense by a higher degree of proof than the law requires. A mere preponderance and not a clear preponderance of the evidence, is sufficient.

The court also charged the jury as follows:

> * * * "Unless you are satisfied from the evidence that the plaintiff dried these so-called belt butts for the purpose of intentionally deceiving the defendant," etc.

Clearly, such instruction was erroneous. It was not necessary for defendant to submit evidence that would satisfy the jury, and to so instruct them constituted prejudicial error. Sonneman v. Mertz, 221 Ill. 362.

In our opinion, the trial court committed reversible error in charging the jury as hereinabove set forth, on the vital issue in the case, for which the judgment must be reversed and the cause remanded.

It is contended by plaintiff that defendant is now precluded from assailing the instruction of the court, because no objection was made at the close of the charge, before the jury retired, as required by the rules of the municipal court. However, the rules were not introduced in evidence and this court does not take judicial notice thereof. (Bixby v. C. C. Ry. Co., 260 Ill. 478.) Therefore this point is not well taken.

taken.

by. Ed.", 142 Ill. 478.) Therefore this point is not well court does not take judicial notice thereof. (Kinzer v. C. C. &

Henry retired, as required by the rules of the municipal court. ne objection was made at the close of the charge, before the presented from electing the institution of the suit, because it appeared that plaintiff had proved the case by a preponderance of the evidence, and also directed a verdict for the plaintiff in the event defendant failed to prove fraud on the part of the plaintiff. Plaintiff was required to establish his case by a preponderance of the evidence, regardless of whether or not defendant succeeded in establishing its counter claim.

The instruction was also misleading in that it required defendant to prove fraud by a clear preponderance of evidence. This instruction placed upon defendant the burden of establishing its defense by a higher degree of proof than the law required. A mere preponderance and not a clear preponderance of the evidence, is sufficient.

The court also charged the jury as follows:

* * * "Unless you are satisfied from the

evidence that the plaintiff tried these cases as stated here the purpose of instructionally deceiving the jury, clearly, such instruction was erroneous. It was not necessary for defendant to submit evidence that would justify the jury, and to so instruct them constituted prejudicial error. Lange-man v. Kurtz, 251 Ill. 382.

In our opinion, the trial court committed reversible error in charging the jury as hereinbefore set forth, as the evidence in the case, for which the judgment must be reversed and the cause remanded.

It is contended by plaintiff that defendant is now

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

For the reasons heretofore assigned, the judgment will be reversed and the cause remanded.

Reversed and remanded.

2980

158 - 22106

JACOB BASS,
Defendant in Error,

vs.

WILLIAM T. WOODLEY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 469

STATEMENT OF FACTS. This was an action brought to recover $900 for rent on a written guaranty (not under seal) of a lease of a certain theatrebuilding. The case was submitted to the court without a jury, resulting in a finding of the issues against defendant and judgment for $900 in favor of plaintiff.

On Feb. 1, 1913, defendant, then the owner of said building, leased same to a certain Beyersdorfer for a term commencing Feb. 1, 1913, and ending Nov. 30, 1915, at a rental of $150 a month.

On Feb. 20, 1913, plaintiff entered into a written contract with defendant, agreeing to purchase said premises for $65,000, subject to existing leases, including the lease in question. Plaintiff testified that prior to entering into said contract, he told defendant and the latter's brokers that he would not purchase said property unless defendant would guarantee to him payment of the said rent, and that defendant so agreed. Woodley, the defendant, admitted negotiations were had in regard to guaranteeing the payment of said rents, but denied any parol agreement to that effect.

The sale of the premises was consummated on March 6, 1913, as contemplated by said written contract.

Term Rule.

Defendant in Error,

vs.

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2052 I.A. 469

March 6, 1913, as contemplated by said written contract.

The sale of the premises was consummated on

to that effect.

the Defendant in Error, but denied any Power whatever

ratified negotiations were had in regard to terminating

rent, and that document be signed. Hensley, the Defendant,

unless Defendant would guarantee to him Payment of the said

Justice's Problem that he could not purchase said Property

entering into said contract, he told Defendants and the

the Issue in question. Plaintiff testified that prior to

Premises for $28,000, subject to existing Leases, including

written contract with Defendant, agreeing to purchase said

at a Rental of $120 a month.

On Sep. 20, 1912, Plaintiff entered into a

a Term commencing Sep. 1, 1912, and ending Nov. 30, 1912,

said Building, leased unto to a certain Hay-Weather for

$500 in Favor of Plaintiff.

On Sep. 1, 1912, Defendant, then the Owner of

Finding of the Issues against Defendant and Judgment for

was submitted to the Court without a Jury, resulting in a

sent) of a Lease of a certain Store Building. The case

to recover $500 for Rent on a written Tenancy (not under

Plaintiff, Defendant in Error, Appellant in Error, Appellee.

A deed of conveyance, duly executed by defendant, was delivered to plaintiff, together with the following written assignment and guaranty of said lease:

> "For value received, I hereby convey, transfer and assign to Jacob Bass and his heirs and assigns, my interest in the within lease and the rents thereby secured, and further hereby guarantee the payment of rents thereby secured,
> IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of March, 1913.
> (Signed) Wm. T. Woodley."

Thereupon the consideration provided for in said deed was paid by plaintiff to defendant. The latter paid to plaintiff the rent for said theatre from March 6, 1913 to April 1, 1914, and this suit was brought on said guaranty to recover uncollected rent for the six months next following.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The real question presented for our determination is, was there a consideration for the guaranty? Defendant's assignment and guarantee to plaintiff of the lease are both contained in the same instrument, and were executed and delivered at the same time that defendant executed and delivered to plaintiff the deed of conveyance to the premises in question. In our opinion, they constituted one transaction and were supported by the same consideration. While parol evidence is not admissible to vary or contradict the terms of a deed or written contract, yet such evidence may be introduced to show the true consideration. The recitals in a deed in regard to the consideration may be inquired into, provided it is not sought to impair the effect of the deed of conveyance. Sterricker et al. v. McBride et al., 157 Ill. 70.

For the reasons herein stated the judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

[illegible] and quietly of said issue:

"For value received, I hereby convey, transfer
and assign to Jacob Rose and his heirs and assigns,
my interest in the within lease and the rents thereby
secured, and further hereby guarantee the payment of
rents thereby secured.

IN [illegible], I have hereunto set my
hand and seal this 5th day of March, 1911.
[illegible] Co. C. Hodley."

Thereupon the consideration provided for in said deed was
paid by plaintiff to defendant. The latter then delivered
to plaintiff, together with the following written
[illegible] and quietly of said issue:

"For value received, I hereby convey, transfer
and assign to Jacob Rose and his heirs and assigns,
my interest in the within lease and the rents thereby
secured, and further hereby guarantee the payment of
rents thereby secured.

IN [illegible], I have hereunto set my
hand and seal this 5th day of March, 1911.
[illegible] Co. C. Hodley."

Thereupon the consideration provided for in said deed was
paid by plaintiff to defendant. The latter then delivered
to plaintiff, together with the following written
assignment and guaranty

190 - 22142

SAMUEL H. THOMPSON,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 471

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case there is no bill of exceptions in the record. The points relied upon by plaintiff in error for a reversal are predicated upon recitals in the clerk's transcript of a motion for a new trial and affidavits in support thereof, which upon motion this court has stricken from the record, because such recitals are not properly a part thereof. The rule is well settled and uniformly observed that a motion for a new trial and the rulings of the court thereon can only be preserved in the record by a bill of exceptions. Gill v. People, 42 Ill. 321; Mason v. Lets, 73 Ill. 371. Affidavits are a part of the record only when they are brought into it by a bill of exceptions and they are not made a part of the record merely by being copied into the record by the clerk and certified by him. Pardridge v. Morgenthau, 157 Ill. 395; People v. Ellsworth, 261 Ill. 275.

There being nothing before this court for determination, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

201 - 22153

W. S. WILBER and C. H. INNESS, doing business as WILBER & INNESS, Defendants in Error,

vs.

GIUSEPPE and FILIPPO MIRABELLA, doing business as G. MIRABELLA & CO., Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

205 I.A. 472

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action brought to recover the contract price for two car loads of potatoes sold and delivered. There was a trial by jury, resulting in a verdict and judgmentfor $611.56. It is contended by defendants that the verdict is contrary to the law and the evidence and that the court erred in instructing the jury.

The sole questions of fact are, (a) whether the sale in question was unconditional or dependent upon quality and whether the potatoes were sold by invoice weight or scale weight. These questions were decided by the jury adversely to defendants' contention, and we are unable to say that their verdict is against the manifest weight of the evidence. It is admitted that the potatoes, which were in sacks on open cars, were in part examined by defendants before acceptance. The question is not whether there actually was a thorough inspection, but whether there was a reasonable opportunity for such an inspection before acceptance. Walker et al. v. Barnett Bros., 174 Ill. App. 472. That defendants had such opportunity of inspection, and did in part inspect, is not denied.

doing business as Elmer & Smith,
Delaware in Error,

vs.

OF CHICAGO.

doing business as E. Klenner's
CO.",
Plaintiffs in Error.

Mr. Justice McKenna delivered the opinion of the Court.

This was an action brought to recover the amount
paid for two car loads of potatoes sold and delivered.
There was a trial by jury, resulting in a verdict and judg-
ment for $911.99. It is contended by defendants that the
verdict is contrary to the law and the evidence and that the
court erred in instructing the jury.

The sole questions of fact are, (a) whether the
potatoes were accepted or delivered at destination within
the meaning of the contract, and (b) whether the potatoes
were sold by instruction subject to
examination. These questions were decided by the jury
against the plaintiff in error. The evidence is
sufficient to [illegible] warrant the verdict, and we are unable to
say that the jury's finding the manifest weight of the evi-
dence. It is admitted that the potatoes, which were in excel-
lent condition, were in part examined by defendants prior
to their arrival at destination, but this was a reasonable
opportunity for such an inspection before acceptance. Safety
at 81. v. Durant Bros., 174 Ill. App. 422. That defendants
had no opportunity of inspection, and did in fact inspect,
is not denied.

We are of opinion that defendants were given a fair trial, and that there was no error in the instructions, and that the judgment of the Municipal Court should be affirmed.

AFFIRMED.

the judgment of the municipal court should be affirmed.

VALLIANT.

We are of opinion that defendants were given a fair trial, and that there was no error in the instructions, and that

571 - 21969

ESTELLA M. COSTER, Executrix of the Estate of HENRY P. COSTER, Deceased,

Appellee,

vs.

HENRY ULLRICH,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

205 I.A. 476

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Estella M. Coster, as Executrix of the Estate of Henry M. Coster, deceased brought an action of assumpsit against Henry Ullrich to recover $2500. There was a verdict for $2809.80 in favor of plaintiff. A motion for a new trial was overruled an judgment entered on the verdict. Shortly thereafter defendant moved that the judgment be vacated, which motion was allowed. Thereupon plaintiff remitted the sum of $579.80, and judgment was entered for the balance of the verdict, $2230, to reverse which this appeal is prosecuted.

The declaration consisted of four special counts and the common counts. Each of the four special counts alleged in substance that on February 18, 1911, defendant sold for Henry P. Coster a certain farm in Wisconsin for $2500 and that he refused to account for the same.

The evidence disclosed that the defendant was engaged in the real estate business with offices in Chicago; that he sold a farm located in Wisconsin to the deceased for $4200, upon which the deceased during his lifetime from

opinion of the court.

time to time paid the sum of $2230; that this farm was exchanged by the deceased through the defendant for another farm in Wisconsin. Afterwards a dispute arose between the parties as to the amount the deceased had paid on account of the purchase price of the farm, and in order to adjust the matter it was agreed that the defendant should sell the Wisconsin farm for $4500. Coster, who had been employed as a conductor on a suburban train running between Downers Grove and Chicago, moved from Downers Grove to the farm in Wisconsin, but soon afterwards left the farm and returned to Downers Grove. On February 6, 1911, the defendant and the deceased entered into a contract, whereby the defendant agreed to sell certain lots in Melrose Park to the deceased. The contract was in writing, was delivered to the deceased, and by him filed for record in the Recorder's office of Cook County. A few days after the execution of this contract, the deceased and the defendant with another person went to examine the lots, and afterwards, on or about February 25, 1911, the deceased and his wife executed a quit-claim deed to the Wisconsin farm and delivered the same to the defendant. The evidence is not clear who, if anyone, was named as grantee. No consideration, however, passed between the parties, and there was no evidence that the defendant sold the Wisconsin farm, or received any money for it as alleged in the special counts. In fact there was no evidence of any kind that tended to sustain any of the special counts.

It also appears from the evidence that the defendant was not the owner of record of the lots in Melrose Park,

but that the legal title was in one Heitmann, who had executed a contract for the sale of the lots to the defendant. Coster died about May 8, 1912, and his wife was appointed executrix of his estate on or about May 16, 1912, and she together with other parties went to examine the Melrose Park lots. There was evidence that tended to show that the lots pointed out to her were different lots from those which the deceased understood he was purchasing. The plaintiff, after looking over the lots, refused to have anything to do with them, and demanded the return of the money which had been paid on the Wisconsin farm.

The defendant contends that the agreement between him and the deceased was that the Melrose Park lots were to be exchanged for the equity in the Wisconsin farm. The evidence in the record is very unsatisfactory and under no theory of the case can the judgment be sustained. According to the plaintiff's own testimony she is seeking to recover the purchase money paid on account of the Wisconsin farm, and at the same time she is retaining the contract for the purchase of the Melrose Park lots. Under these circumstances plaintiff could not recover under the common counts.

The judgment of the Superior Court of Cook County is reversed, and the cause remanded.

REVERSED AND REMANDED.

609 - 22007

MARY LOUISE KING, et al,
Appellees,

vs.

FRED J. BUSH and EMMA B. SHIRLEY,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 477

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal, appellants seek to reverse a decree of the Circuit Court of Cook County, awarding to appellee Mary Louise King the proceeds of a benefit certificate issued by the Royal Arcanum to Oliver Bush.

The record discloses that a benefit certificate was issued to Oliver Bush in 1884, in which his wife Mary Bush was named as beneficiary; that afterwards Mary Bush died, and the certificate was surrendered and another issued in lieu thereof, March 14, 1908, in which the children of Oliver Bush including appellee and appellants were named as beneficiaries. On June 16, 1909, this certificate was surrendered and another issued in which appellee and her two children were named and on January 23, 1912, said Bush again surrendered his certificate and obtained in lieu thereof the one involved in this proceeding in which appellee, Mary Louise King is named as the sole beneficiary. Afterwards Oliver Bush died, and a controversy arose as to who was entitled to the insurance. The Supreme Council of the Royal Arcanum filed a bill of interpleader making the several parties defendants. After issues formed, the cause was referred to a master, who took the proofs and

Mary Dublin Klaw, et al.,

Appellants,

vs.

Paine T. Knox and Hiram R. Steptoe,

Appellees.

Appeal from

District Court

of the United

States for the

Southern District

of Texas.

Comes now the Appellant Mary Dublin Klaw, by her attorneys, and petitions the Court for a rehearing herein, and in support thereof respectfully shows:

That the Court, in its opinion rendered herein on December 21, 1936, has overlooked and misapprehended certain material facts and matters of record, and has misapplied the law to the facts as they appear of record, and has misconstrued the pleadings and issues presented by the respective parties in this proceeding in the following particulars, to-wit:

1. The Court has misapprehended the nature of the action brought by Appellant herein, and has misconstrued the pleadings and issues presented by the respective parties thereto. The Court has stated in its opinion that the action was brought by Appellant to recover the sum of $10,000.00 alleged to be due her as a commission for the sale of the property described in the pleadings. The Court has also stated that the pleadings and evidence show that Appellant was employed by Appellees to sell the property described in the pleadings, and that Appellant was the procuring cause of the sale thereof. The Court has also stated

made up his report, which was in favor of appellee. On the coming in of the report, exceptions were filed. The exceptions were overruled and a decree entered in accordance with the report, to reverse which this appeal is prosecuted.

One of appellant's contentions in the trial court was that on July 16, 1909, when Oliver Bush surrendered the benefit certificate in which they were named as beneficiaries, he was of unsound mind; and appellants now contend that the decree is erroneous in that it fails to find the mental condition of Oliver Bush at that time; that both the decree and the master's report are silent upon this point, and that this error is not cured by the finding in the decree that said Oliver Bush was of sound mind in 1912, when the certificate involved in this case was issued.

The record discloses that the testimony taken before the master was made a part of his report and filed in court. None of this evidence, however, is contained in the record before us. Every intendment, therefore, is in favor of the correctness of the decree. Specific findings of fact are not necessary where the evidence is preserved, and if, as counsel for appellants states, there was no finding as to the mental condition of Oliver Bush in 1909, we must presume in the present state of the record that if such finding were necessary the evidence justified a finding that he was then of sound mind. There is no merit in this appeal.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

625 - 22023

DAVID LEVI, et al,

Appellees,

vs.

CHARLES R. BEADLES and
ROBERT D. BEADLES,

Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 488

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

David Levi filed a bill to forclose a trust deed on certain real estate in Chicago, given to secure an indebtedness evidenced by bonds or notes, against Charles R. Beadles, his wife and other parties. Voluminous pleadings, consisting of answers, cross-bills and amendments, were filed, and after issues formed, the cause was referred to a master who took the testimony, made up his report, and on the coming in of the report, exceptions were filed, some of which were sustained and some overruled. A foreclosure of the trust deed in the original bill was denied, but foreclosure of a mortgage in the form of a warranty deed was decreed, and in default of payment the property ordered sold. Both parties being dissatisfied prayed and were allowed appeals. Beadles perfected his appeal and Levi has assigned cross-errors.

The facts, so far as material, are these: About the year 1905 Beadles owned some vacant property in Chicago, for which he paid $3500. He was desirous

Mr. Bentley delivered the
opinion of the court.

Maria Leaf filed a bill to foreclose a trust
deed on certain real estate in Chicago, given to secure
an indebtedness evidenced by notes of Walter, Whitney
Charles H. Bradley, his wife and other parties. Adjudi-
one Bloodgood, consisting of answers, cross-bills and
amendments, were filed, and after issues formed, the
cause was referred to a master who took the testimony,
made up his report, and on the coming in of the report,
exceptions were filed, some of which were sustained and
some overruled. A foreclosure of the trust deed in the
original bill was decreed, but foreclosure of a mortgage
in the form of a mistress deed was denied, and in ac-
cordance therewith the bond was declared, and in ac-
cordance therewith the bond was declared, and in ac-
cordance therewith the bond was declared

of constructing an apartment building on the property, and for this purpose entered into an agreement with A. G. Tisdelle. The agreement provided that Beadles should execute one hundred bonds or notes of $500 each, totaling $50,000, to be secured by a trust deed on the property. The notes bore interest at five and one-half per cent. They were executed and delivered to Tisdelle, and the trust deed filed for record; thereupon Tisdelle endeavored to sell the bonds, the proceeds thereof to be used in the construction of the building. Tisdelle succeeded in selling only three of the notes, the proceeds of which were paid out by him toward the construction of the building, and in addition Tisdelle advanced other sums of money. The agreement also provided that Tisdelle was to receive $3,500 for his services. Tisdelle being unable to sell the notes or advance further moneys, Beadles entered into negotiations with Levi, which resulted in an agreement whereby Levi was to advance sufficient money to complete the building, superintend the construction thereof, and upon its completion, manage and collect the rents, and in consideration therefor, Beadles agreed to pay Levi $4,000 for his services in procuring the loan and superintending the construction of the building, $2,000 of which was secured by trust deed on another piece of property, and Levi was to receive ten per cent of the rents collected in payment of his services in managing the property. As a further security to Levi for the moneys advanced and the services performed by him, Beadles and his wife executed a warranty deed to the premises in question. Before this agreement could be made, however, it was necessary to get possession of the trust deed and notes

or bonds which were in the possession of Tisdelle, except the three which he had sold. Tisdelle refused to have anything to do with Levi, and thereupon he was informed by Beadles that the Metropolitan Trust and Savings Bank would advance sufficient money to complete the building. Tisdelle agreed to execute his note for $40,000 to the bank and pledge the trust deed and notes as security, which was done. The transactions were had through the cashier of the bank and apparently not disclosed to the directors or other officials of the bank. He was to receive $2,000 of the $4,000, which Beadles had agreed to pay Levi. At the time Tisdelle executed his note and turned over the bonds to the bank, it was agreed that he might continue his efforts to sell the notes or bonds. His efforts, however, in this regard were unsuccessful. Tisdelle paid interest on his $40,000 note for some time, but afterwards in default of such payment, the cashier of the bank, together with an attorney and Levi, went through the form of selling the collateral by reason of the default in payment of the interest, Levi being the purchaser of such collateral. Money was advanced by the bank to Levi from time to time and paid out in the construction of the building, the total amount advanced for such purpose being $43006.27. Levi did some work towards superintending the construction of the building, but the principal part of the work was done by Beadles. After the building was completed, Levi proceeded to collect the rents. Levi was paid $2,000 of the $4,000 which he was to receive for obtaining the loan and superintending the construction of the building. The cashier of the bank disclaimed any interest in the other $2,000.

or bonds which were in the possession of Tisdale,
except the three which he had sold. Tisdale refused to
have anything to do with Levi, and thereupon he was in-
formed by Beasley that the Metropolitan Trust and Savings
Bank would advance sufficient money to complete the build-
ing. Tisdale agreed to execute his note for $40,000 to
the bank and pledge the trust deed and notes as security,
which was done. The transactions were had through the
cashier of the bank and apparently not disclosed to the
directors or other officials of the bank. He was to
receive $2,000 of the $4,000, which Beasley had agreed to
pay Levi. At the time Tisdale executed his note and
turned over the bonds to the bank, it was agreed that
he might continue his efforts to sell the notes or bonds.
His efforts, however, in this regard were unsuccessful.
Tisdale paid interest on his $40,000 note for some time,
but afterwards in default of such payment, the cashier of
the bank, together with an attorney and Levi, went through
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fault in payment of the interest, Levi being the purchaser
of such collateral. Money was advanced by the bank to Levi
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building, the total amount advanced for such purpose being
$42000.XX. Levi did some work towards superintending the
construction of the building, but the principal part of the
work was done by Beasley. After the building was completed,
Levi procured to collect the rents. Levi was paid $2,00
of the $4,000 which he was to receive for obtaining the
loan and superintending the construction of the building.
The cashier of the bank disclaimed any interest in the matter
$2,000.

Both the master and chancellor found that the pretended sale of the trust deed and bonds or notes was fraudulent and void, and that it was a mere pretext to enable Levi to obtain possession of them. By the decree Levi was allowed the $2,000 which he had been paid for his services in procuring the loan and superintending the construction of the building, five and one-half per cent on the moneys advanced by him, and ten per cent on the gross amount of rents collected by him. The balance $2,000 claimed by him as payment for his services was disallowed by the court and foreclosure of the trust deed was denied. The decree also provided that the moneys advanced by Tisdelle, together with interest thereon be paid to his trustee in bankruptcy, Tisdelle having been adjudged a bankrupt in the meantime. In default of these payments, the property was ordered sold under the warranty deed from Beadles and wife to Levi, which was in the nature of a mortgage.

Beadles contends that the decree is erroneous in that the $2,000 awarded Levi for his services in obtaining the loan, the five and one-half per cent on the moneys advanced, and the ten per cent of the gross rents, constitute usury. In this contention, we are unable to concur. We are clearly of the opinion that the evidence shows that Levi rendered valuable services in obtaining the money to proceed with the construction of the building; that the money was really advanced to Levi by the bank, and that the ten per cent of the gross rents was not an unreasonable charge for the services rendered under the circumstances.

of a marriage.

dead was buried. The decree also provided that the monies
disallowed by the court and foreclosure of the first
$1,000 claimed by him as payment for his services was
three months of rents collected by him. The balance
owed on the mortgage attained by him, and ten per cent on the
the construction of the building, five and one-half per
cent in process of the loan and satisfactory
Deal was allowed the $1,000 which he had been paid for
cash Deal to obtain possession of them. By the terms
transaction and void, and that it was a mere pretext to
Plaintiff and Wells or either was
to procure with the construction of the building; that the
Deal knowingly maliciously entered in obtaining the money
We are clearly of the opinion that the evidence does not
tube mark. In this connection, we are unable to assent.
advanced, and the two per cent of the gross rents, prorati-
ing the Deal, the five and one-half per cent on the excess
in that the $1,000 reserved Deal for his services in obtain-
Deal's contention that the duties is erroneous

de a true meeting and will to Deal, which was in the nature
Bellevue, the plaintiff was stopped and under the authority
advanced $ Tisdale, together with interest thereon be
paid to him thereto on demand. Tisdale having been
declined a payment in the meantime. In default of these

Beadles next contends that he should have been allowed damages against Tisdelle, for the reason that Tisdelle's inability to dispose of the bonds necessitated his incurring a great deal of additional expense. At the time Tisdelle gave up the trust deed and bonds, Beadles executed the following instrument:

> "A. C. Tisdelle: Chicago, August 23, 1905.
> In consideration of your borrowing $40,000 on my ninety-seven $500 bonds from the Metropolitan Trust & Savings Bank, I hereby agree to pay you any sum or sums of money required to complete the building, over and above the $33,764.00, which is the amount still due me on the $50,000 loan negotiated by you.
> CHARLES R. BEADLES."

By this document, Beadles admits Tisdelle's claim and both the master and chancellor found that he was now estopped to claim any damages by way of set-off. We think that if he had any claim against Tisdelle, he should have so stated at the time Tisdelle surrendered the trust deed and notes, and executed his personal note for $40,000 to the bank. Not having done so, he cannot now be heard to complain.

Beadles further objects to the allowance of $250 to Master Jamieson for drafting and redrafting the decree. It appears that Master Rogers who took the testimony and made his report, died prior to the entry of the decree, and that the court requested Master Jamieson to draft a decree. So far as we are able to ascertain, there was no order of reference to Master Jamieson. We have no doubt from an examination of the record that $250 would not be an unreasonable charge for the preparation of the decree, but we know of no authority that would warrant such an allowance to be taxed as costs.

Beedles next comments that he should have been allowed damages against Tisdale, for the reason that Tisdale's inability to dispose of the home necessitated his incurring a great deal of additional expense. At the time Tisdale gave up the trust deed and bonds, Beedles executed the following instrument:

"J. C. Tisdale: Dallas, August 23, 1926.
In consideration of your surrendering $60,000
on my slowly-paying $100 bonds (see the Metropoli-
tan Irust & Savings Bank, I hereby agree to pay
you only one or some of money received in negotiate
the building, over and above the $45,750.00, which
is the amount still due me on the $80,000.00 loan
negotiated by you.
CHARLES R. BEEDLES."

By this agreement, Beedles admits Tisdale's claim and both the master and chancellor found that he was now estopped to claim any change by way of set-off. We think that it be his only claim against Tisdale, he should have so stated at the time Tisdale surrendered the trust deed and notes, and executed his personal note for $45,750 to the bank. Not having done so, he cannot now be heard to complain.

Beedles further objects to the allowance of $250 to Master Jamieson for drafting and preparing the decree. It appears that Master Hooker was sick the terri-
mony and made his report, died prior to the entry of the decree, and that the court referred Master Jamieson to draft a decree. So far as we are able to ascertain, there was no time of reference to Master Jamieson. We have no doubt from an examination of the record that $250 would not be an unreasonable charge for the preparation of the decree, but we know of no authority that would warrant such an allowance to be taxed as costs.

Beadles next contends that the court erred in allowing Master Rogers $2,500, when the master only requested $2,000. The record shows that after Master Rogers had prepared his report and before he made up an estimate of his charges, he died; that his successor in office made a supplemental report, itemizing the services rendered by Master Rogers, and states that in his opinion such services under the statute were reasonably worth $2,000. The amount of fees to be allowed to a master as stated in his report is not conclusive on the chancellor. He may increase or decrease it as authorized by law. By statute Cook county is declared to be a county of the third class and in such counties masters may receive for examining questions in issues referred to them and reporting conclusions thereon such compensation as the court may deem just, in addition to their specific fees provided by statute. The record before us consists of six different parts. It is certified by the clerk that it was prepared "per praecipe." We are unable therefore to say whether the record is complete, and after carefully considering the matter, we cannot say that the allowance of $2,500 was not authorized.

Levi contends that the decree is erroneous, in that it disallowed a foreclosure of the trust deed given to secure the bonds or notes, and that he was not awarded the $4,000 which Beadles agreed to pay him for procuring the loan and rendering services in superintending the construction of the building; that it is also erroneous in that $1,500 of the costs incurred before the master were taxed against him. We think that the evidence clearly shows that the trust deed and bonds or notes, were not purchased

Board is next considered that the court erred in allowing Master Rogers $2,000, when the master only recommended $1,000. The record shows that after Master Rogers had prepared his report and before he made it an estimate of six charges, he died; that his successor in office made a supplemental report, identifying the services rendered by Master Rogers, and states that in his opinion such services under the statute were reasonably worth $2,000. The amount of fees to be allowed to a master as stated in his report is not conclusive on the chancellor. He may increase or decrease it as authorized by law. By statute each county is declared to be a county of the third class and in each commission masters may receive for examining questions in issues referred to them and reporting decisions thereon such compensation as the court may deem just, in addition to their specific fees provided by statute. The record before us consists of six fifteenpart parts. It is certified by the clerk that it was prepared "per praecipe." We are unable therefore to say whether the record is complete, and after carefully considering the matter, we cannot say that the allowance of $2,000 was not authorized.

Last contends that the decree in error-am, in that it disallowed a foreclosure of the trust deed given the $4,000 which Beadles agreed to pay him for procuring to secure the bonds or notes, and that he was not entitled $1,000 of the decree inasmuch before the master made his report. We think that the evidence clearly shows that the trust deed and bonds or notes were not procured

by Levi; that he obtained possession of them by subterfuge; that while Beadles did agree to pay him $4,000, yet the evidence shows that $2,000 of this was to be given to the cashier of the bank for what he did in the matter. The evidence also shows and the decree finds that a large part of the expense before the master was incurred by reason of Levi's attempt to uphold the pretended sale of the trust deed, and we are unable to say that this finding is unwarranted. We are clearly of the opinion, therefore, that these contentions are untenable.

The decree of the Circuit Court of Cook County is affirmed in all respects, except as to the allowance of $250 for drafting and redrafting the decree. The decree will, therefore, in this respect be reversed and the cause remanded with directions to modify the decree in this regard. Levi and Beadles will each be required to pay his own costs incurred by this appeal, and one-half of the clerk's costs in this court.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

clerk's costs in this court.

AFFIRMED IN PART, REVERSED IN PART AND
REMANDED WITH DIRECTIONS.

652 - 22030

PETER PREVENAS,
Appellee,

vs.

KALODIMOS BROTHERS ICE CREAM & CANDY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 490

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Appellant by this appeal seeks to reverse an order of the Circuit Court of Cook County, overruling its motion to vacate a final decree entered in the case.

It appears that on July 22, 1913, appellee filed an amended bill of complaint against appellant and another. On the next day, appellant answered the amended bill, and appellee filed a replication. July 11, 1914, an order was entered striking the cause from the docket, and on July 14, 1914, on motion of the appellee the cause was reinstated. January 22, 1915, the cause came on for hearing and a final decree was entered. On February 6, 1915, and within the term, appellants moved the court to vacate the decree. The motion was overruled and this appeal followed.

Appellant, in support of its motion to vacate, filed an affidavit of its officers, and an affidavit of Peter Kaperonis, the other defendant, and an affidavit of its solicitor and its sworn answer.

The affidavit of appellant's officers stated in substance that they had active charge of appellant's

Appellee,

vs.

Appellant.

Appeal from the Circuit Court of Cook County, Criminal Division.

Hon. [illegible] delivered the opinion of the court.

Appellant by this appeal seeks to reverse an order of the Circuit Court of Cook County, overruling his motion to vacate a final decree entered in the case.

It appears that on July 23, 1913, appellee filed an amended bill of complaint against appellant and another. On the next day, appellant answered the amended bill, and appellee filed a replication. July 11, 1914, an order was entered setting the cause for the docket, and on July 14, 1914, on motion of the appellee the cause was retained. January 23, 1917, the cause came on for hearing and a final decree was entered. On February 6, 1919, and within the term, appellant moved the court to vacate the decree. The motion was overruled and this appeal followed.

Appellant, in support of his motion to vacate, filed an affidavit of his solicitor and his sworn answer. Peter Thurnwald, the other defendant, and an affidavit of his solicitor and the sworn answer.

The affidavit of appellant's efforts stated in substance that they had active charge of appellant's

business and of the matters involved in the suit; that prior to April 3, 1914, appellant was represented in this suit and other legal matters by Percival Steele, its attorney, who prepared and filed its answer; that Steele died on April 3, 1914, and his office thereafter was abandoned, and many of his office records and files, including the files in this case, were lost or destroyed; that during the month of June, 1914, one of appellant's officers turned over certain legal matters to its present counsel and understood that their interest in this cause was being looked after by such counsel; that neither appellant nor any of its officers or agents had any knowledge that the cause was on trial at the time the decree was entered; that it received no notice of the hearing of such cause previous to the time the decree was entered, and that it did not learn of the entry of the decree until February 1, 1915. Counsel for appellant in his affidavit stated that about the first of June, 1914, appellant turned over to him for attention several cases that had previously been handled for appellant by Percival Steele; that the officers of appellant are Greeks, whose knowledge of the English language is limited; that previous to 1909 he was associated with Percival Steele in the practice of law and was familiar with the manner in which Steele kept his various files; that prior to June 1, 1914, at the request of appellant, he requested the former employees of Steele, who then had charge of Steele's office files and records, to deliver all files with reference to appellant's business to him; that in pursuance of such request he received some fifteen or twenty files representing pend-

he received some fifteen or twenty files concerning Bourgeant's business to him; that in pursuance of such request and the receipt, he requested the Circuit Courthouse of Steele, was then had charge of Steele's office files kept his various files; that prior to June 1, 1914, at Ida and was familiar with the manner in which Steele he was associated with Percival Steele in the practice of the English language is limited; that previous to 1910 that the officers of appellant are Greeks, whose knowledge previously been handled for appellant by Percival Steele; turned over to him for attention several cases that had Hewit stated that about the first of June, 1914, appellant 11 February 1, 1915. Counsel for appellant in his affi- ance that it was not learn of the entry of the decree un- of such causes previous to the time the decree was entered, was entered; that it received no notice of the hearing edge that the cause was on trial at the time the decree cause was being looked after by such counsel; that neither sent deemed and understood that their interest in this appellant nor any of its officers or agents had any knowl- officers turned over certain legal matters to its pre- that during the month of June, 1914, one of appellant's including the files in this cause, were lost or destroyed; was abandoned, and many of his office records and files, Steele died on April 3, 1914, and his office thereafter its attorney, who prepares and files its answer; that this suit and other legal matters by Percival Steele, Prior to April 2, 1914, appellant was represented in business and of the matters involved in the suit; that

ing and disposed of matters, but that he received no files in the case at bar; that if appellant's officers "spoke to him particularly about this case as they now claim that they did, affiant did not fully understand that it was a case pending upon the trial calendars * * * which required watching;" and that having no files of the case, "said cause in this matter escaped affiant's attention."

In opposition to the motion to vacate, appellee's counsel filed an affidavit that he sent by registered mail, July 13, 1914, a notice addressed to Percival Steele and Kalodimos Brothers, that he would on the following day, July 14th, before a certain chancellor move that the cause be reinstated. The affidavit includes a receipt from the postmaster showing the registration of the letter.

Appellant contends that this notice was insufficient, for the reason that it was addressed to "Kalodimos Brothers" and not to appellant. From a careful reading of the affidavits, however, it clearly appears that appellant does not deny receiving this notice. The burden was upon it to show that it did not receive the notice, and we are clearly of the opinion that appellant failed in this regard.

Appellant, however, contends that as the bill prayed for an accounting, the cause should have been referred to a master, and that it should have been notified of the hearing before such master. The accounting, if any, consisted of but two items. It was therefore proper that the matter be heard by the chancellor without a reference to a master. The contention is without merit.

ing and disposed of matters, but that he received no
claims in the case as such; that if appellant's attorne
"spoke to him particularly about this case as they now
claim that they did, efforts did not fully under stand
that it was a case pending upon the trial calendars b e
motor required watching;" and that having no title of
the case, "said cause in this matter escaped appellant's
attention."

In opposition to the motion to vacate, appellee's
counsel filed an affidavit that he went by registered mail,
July 12, 1914, a notice addressed to Leonard Steele and
Zaledimos Brothers, that he would on the following day,
July 14th, before a certain commissioner move that the cause
be reinstated. The affidavit includes a receipt from the
postmaster showing the registration of the letter.

Appellant contends that this notice was insufficient; for the reason that it was addressed to "Zaledimos Brothers" and not to appellant. Even a careful reading of the affidavit, however, it clearly appears that appellant does not seek reversing this notice. The parties was upon it as else that it did not receive the letter in this regard.

Appellant, however, contends that on the hill pleaded for an accounting, the cause should have been referred to a master, and that it should have been notified of the hearing before such master. The accounting, it was, consists of but two items. It was therefore proper that the matter be heard by the commissioner without a reference to a master. The motion is without merit.

Appellant further contends that the affidavit and its sworn answer show a meritorious defense, and therefore the chancellor should have in his discretion vacated the decree. The record shows that appellee and defendant Kaperonis purchased a store from appellant for $8,500; that appellee had paid $2,000 cash and executed notes of $300 each for the balance, one of the notes falling due each month; that appellee paid the first note; that he took possession of the store on May 15, 1913, and conducted the business, together with Kaperonis until June 5, 1913, when the store was surrendered to appellant, who took possession thereof. Before a motion to set aside a decree will be granted, the moving party must show both diligence and a meritorious defense, and after a careful examination of the entire record in this case, we are clearly of the opinion that it was not an abuse of discretion for the chancellor to deny appellant's motion.

The order of the Circuit Court of Cook County is affirmed.

AFFIRMED.

518 - 21918.

J. F. DOUGHERTY,
Appellee,

vs.

FREDERICK MECKLENBERG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 491

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks the reversal of a judgment against him for $5,125 entered on appellee's claim for a real estate commission. Appellee's evidence tended to show that appellant had agreed to pay him one half of the sum of $8,250 as a commission in case he was successful in negotiating a deal for the exchange of certain Chicago property for certain property in North Dakota. It is sufficient to say that a contract was entered into between the appellant, as party of the first part, and the Crystal Spring Percheron Horse & Cattle Company, hereafter referred to as the company, and one M. C. Blanchett as parties of the second part. This contract was signed by appellant and by the company by Blanchett as secretary and by Blanchett himself. By the terms of this contract appellant was given an option to accept or reject the properties within fifteen days. It appeared that after he had examined the properties he asked for a further extension, and Blanchett wrote upon the contract, "I hereby agree to extend the time in this contract to 28th day of October, 1913. Crystal Spring Percheron Horse & Cattle Co., M. C. Blanchett, Treasurer." Afterwards, appellant telegraphed and wrote the parties of the second part, accepting the contract "between Crystal Spring Percheron Horse & Cattle Co., a corporation, M. C. Blanchett and myself." Appellant refused to carry out his contract with the company

and Blanchett, upon the ground that the contract recited that "the stock, farm implements and machinery must show a valuation of $50,000.00." It appears, however, that appellant was given fifteen days to investigate the properties and notify the parties of the second part whether he would accept or reject them; that he did inspect them, and after a further extension of time did accept them and elect to be bound by the terms of the contract. The contention of appellant, when analyzed, is no more than that the agreement was for a commission when the deal was consummated, and that it was never consummated. While that language in the contract between the parties was "that brokerage fees or commission shall be paid to Wm. Kirk & Co. by parties of the first part by the respective parties hereto, as heretofore agreed by them on consummation of deal," that was language in a contract to which appellee was not a party. The agreement between the appellant and appellee, however, was shown by two letters, one from appellee, in which he stated, "If I find you a deal I shall expect you to pay me a commission," and a letter from appellant, in which he said, "In regard to commission I wish to say that you are entitled to 50% and any deal that you make for me you will be paid 50%."

The record clearly establishes that appellee found for appellant a purchaser who entered into a contract with him on terms which were mutually satisfactory; that the contract was formally signed by the parties, and that appellant himself was the party refusing to perform. Appellant now says that a consummation of the deal was not shown because the authority of Blanchett to bind the corporation was not shown, and that the extension of the contract is not signed by Blanchett personally. On the second point, the word "treasurer" in connection with the name "M. O. Blanchett," is, under the

authorities, descriptio personae, while the attachment of the words, "Crystal Spring Percheron Horse & Cattle Co." to the agreement is sufficient if they were put there by a person authorized to act for the company, even though the signature of the person acting as the company's agent does not itself appear. The contract was, in any event, binding upon Blanchett, but the substance of appellant's undertaking was to pay appellee a commission if the latter found a deal for him; he did find one which was acceptable to, and accepted by, appellant. Presumably he satisfied himself in regard to the authority of Blanchett to bind the corporation. Appellee made out a prima facie case when he showed a contract for the sale of the land, formally executed by the parties and accepted by appellant. Whether absence of authority in the agent of one of the parties to make the contract would constitute a defense, is a question which we are not called upon to decide, for no such absence of authority was shown.

We think the evidence fully sustains the appellee's statement of claim. The judgment of the Municipal Court is affirmed.

AFFIRMED.

527 - 21925.

AMERICAN METAL COMPANY,
Appellee,

vs.

U. S. REDUCTION COMPANY,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

205 I.A. 492

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse a judgment in favor of appellee for $807.67, recovered on account of an alleged failure of appellant to comply with the terms of a contract for the purchase of 150 tons of antimonial lead. The description of the antimonial lead, contained in appellee's letter confirming the contract was, "Newark Antimonial Lead, running approximately from 15% to 18% antimony and not above 1% arsenic." Twenty-five tons of antimonial lead were shipped and accepted. Subsequently, appellant's plant was damaged by fire, and it requested postponement of delivery of the balance of the antimonial lead due under the contract. Thereafter, appellee asked shipping directions; thereupon appellant requested a sample of the lead which appellee proposed to deliver in fulfillment of the contract, and when, upon receiving the sample, appellant had it analyzed, it appeared to contain an excess amount of arsenic, and also copper. Appellant thereupon wrote, stating that they would accept the lead provided appellee guaranteed to ship "in accordance with the terms of the contract, namely: 85% lead, 15% antimony, with one per cent variation for arsenic, with the distinct understanding that we have a right to inspect the shipments that you make against the contract, and if we find analysis not according to contract, we shall not pay drafts." They again wrote, "We wish to state that in buying antimonial lead it is understood that this material is to be free of copper. If this was not the case

SUP - CIRCT.

MUNICIPAL WATER COMPANY,

Appellee.

vs.

U. S. CONSERVATION COMMISSION,

Appellant.

APPEAL FROM

WATER COURT,

CITY COUNTY.

2505 1.A. 4098

MR. JUSTICE COCHRAN delivered the opinion of the court.

Appellant seeks by reverse a judgment in favor of appellee for $100.00, recovered on account of an alleged rail ure by appellant to comply wi th the terms of a contract for the purchase of 120 tons of artificial feed. The disposition of the artificial feed, furnished by appellee's latter constitu ing the contract was, "Should Artificial feed, running appreci bly from 12% to 14% moisture and not above 16% moisture." Twenty-five tons of artificial feed were shipped and accepted subsequently, appellant's plant was damaged by fire, and it requested postponement of delivery of the balance of the artificial feed due under the contract. Thereafter, appellee sued claiming (inasmuch) therefore appellant requested a sample of the feed which appellee proposed to deliver in fulfillment of the contract, and when, upon receiving the sample appellant had it analyzed, it appeared to contain an excess amount of cement, and also copper. Appellant therefore wrote, stating that they would accept the feed providing appel lee guaranteed in duly "in accordance with the terms of the contract, namely: 60% feed, 12% moisture, with one per cent variation for cement, with the distinct understanding that we have a right to inspect the shipments that you make again the contract, and if we find analysis not according to contra we shall not pay draft." They again wrote, "In view in stead that in buying artificial feed it is understood that this material is to be free of copper. If this was not the case

the writer would have requested at the time contract had been entered into that provision be inserted that the material was to be free of copper. There is therefore, no room for argument and we will say to you that as soon as you are ready to ship Antimonial Lead containing Antimony 15%; Lead 85% with 1% variation for arsenic we will give you shipping instructions." Shortly after, they wrote to the same effect, and at a later date they wrote, "We cannot use this material if it contains any copper at all, and if you cannot guarantee to furnish us Antimonial Lead absolutely free of copper, then we will ask you to cancel our contract as we cannot accept shipments of material containing copper." There were other letters also to the same effect.

The evidence upon the subject of the meaning of the term "Newark Antimonial lead," was conflicting. Testimony on behalf of appellee tended to show that it was the trade name of an antimonial lead manufactured by a certain company in Newark, New Jersey, which contained, among other substances, copper and arsenic. The secretary of the appellant company testified that he understood the word "Newark" to designate the point of shipment, and nothing more. It will be noted that appellant expressly refused to accept any shipments of antimonial lead unless appellee guaranteed to furnish it "absolutely free of copper." It will be seen that in the letter confirming the order, the amount of lead is not specified, and the only stipulations contained therein are that it should run "approximately from 15% to 18% antimony and not above 1% arsenic." No objection was made to the antimony on the ground that it contained an excess of arsenic, although that was mentioned in subsequent letters; and it was not contended that the variation of a fraction over one per cent. was material. The evidence is not clear as to whether the antimon-

ial lead in question did, in fact, contain an excess of arsenic. In other words, the sole defense was that the samples submitted contained copper, and that appellant was justified in refusing to accept any shipment that was not absolutely free from that metal.

Elaborate briefs have been filed on both sides, and counsel have discussed at some length the question of the admissibility of evidence tending to show that the term "Newark antimonial lead" was a trade name descriptive of antimonial lead containing copper. We think it is not necessary for us to pass upon this feature of the case. The contract expressly stipulated for a percentage of one ingredient, namely, the amount of antimony; it did not stipulate in regard to the amount of lead; it did exclude an excess of one substance, namely, arsenic, but it did not stipulate against the presence of another substance or ingredient. The expression of a prohibition against the presence of a given substance would, under the ordinary canons of construction, exclude any implied exclusion of any other substance. The question of whether, in a given case, the presence in antimonial lead of a substance not referred to in the contract, but of such a character and in such quantities as to make it unsuited to the purpose for which it was intended, or to materially impair its value, would constitute a breach of the contract, is not before us, for there was no testimony in this record that the amount of copper supposed to be contained in the antimonial lead was sufficient to impair its value or render it unsuited to appellant's purposes. Appellant based its refusal upon the very technical ground that it had a right to refuse antimonial lead which contained any copper. In addition to this, it appears from the testimony of appellant's own witnesses that no antimonial lead is produced "absolutely free of copper." Another

witness for the appellant testified that while he would not say that one always finds traces of copper in antimonial lead, "it almost invariably contains a small percentage of copper." In view of this testimony, we do not see how we can say that the refusal of appellant to accept shipments unless the antimonial lead was "absolutely free from copper" was justified under the terms of the contract. In these circumstances, this refusal to accept shipments on that ground constituted a breach of the contract for which appellee was entitled to recover. We are unable to say that the amount of the damages was not justified by the evidence. The judgment of the County Court is affirmed.

AFFIRMED.

544 - 21942.

CARRIE CONRAD, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT,
CHARLES A. STEVENS & BROTHERS, Appellant.	)	COOK COUNTY.

MR. JUSTICE GOODWIN delivered the opinion of the court. 205 I.A. 494

Appellant seeks to reverse a judgment against it for $2,500 for personal injuries to appellee, caused by a fall on a stairway leading from the 5th floor of one building to the 5th floor of another building on a lower level. The declaration, among other things, counted upon a failure to provide proper and substantial hand-rails on the stairway in accordance with an Illinois statute entitled "An Act to provide for the health, safety and comfort of employes." The provision relied upon is Section 104 of Chapter 48 of the Revised Statutes, and is as follows:

> "HANDRAILS ON STAIRWAYS: Proper and substantial handrails shall be provided on all stairways in factories, mercantile establishments, mills or workshops, and the treads on all stairways shall be so constructed as to furnish a firm and safe foothold."

The evidence disclosed that the stairway was separated from the upper floor by a partition which stood directly at the edge of the top tread of the stairway which was from four to six inches wide. Appellant, who in the absence of a contrary showing is presumed to have been still in possession of the stairway, failed to give evidence as to the exact dimensions, but the evidence offered on behalf of the appellee was that the stairway was between six and seven feet wide. A photograph offered in evidence on behalf of appellant shows the door set substantially in the center of the space occupied

by the partition which extended between the hand-rails. Assuming that the stairway was six feet wide, appellant's photograph indicates that the rail at the right-hand of a person going down was substantially twenty inches from the door. The door-knob was at the side of the door nearest this right-hand railing, while the hinges were on the side nearest the left-hand rail; the door opened inwardly. The right-hand railing at the top had been cut away on the outside, and the end of an upright supporting a series of shelves had been set into the part cut away for a space of apparently two feet from the top of the stairway, so that it would be impossible to grasp it, although a hand or portion of it might rest upon it. There was testimony that the top step of the stairway was worn and slippery. The evidence of appellee, an employe of appellant, was to the effect that as she was going from the higher level to the lower, with a gown on her left arm, she opened the door at the head of the stairway with her right hand, and started to step off with her left foot; that the step was narrow, that she overbalanced and made a quick step for the next step to catch herself, tried to get hold of the railing but failed, fell forward to the lower step, and struck at the bottom of the stairway.

We are clearly of the opinion that the evidence disclosed was sufficient to justify the jury in finding that the appellee was in the exercise of ordinary care for her own safety; that in the present instance appellant had failed to provide proper and substantial hand-rails on the stairway as required by statute, and that the accident in question directly resulted from that failure. The primary meaning of the word "proper" is, "Having special adaptation or fitness; specially suited for some end; appropriate." In view of the situation disclosed, we do not think the hand-rail could be said to be proper.

Counsel for appellant criticises the first and second instructions given on behalf of appellee on the ground that they assume that the premises in question fell within the term "factories, mercantile establishments, mills or workshops." This point was distinctly not in issue. The uncontradicted evidence shows that the premises constituted a large mercantile establishment consisting of many departments, with numerous employes. It is not erroneous to assume the existence of an uncontraverted fact fully disclosed by the evidence. Counsel for appellant also complains of the modification "of another instruction," but the instruction itself is not identified or abstracted, and we do not feel constrained to search the record for it. Taking the instruction as printed, however, as correct, we are of the opinion that the modification was properly made, since the declaration counted upon a failure to furnish treads so constructed as to furnish a firm and safe foothold. Counsel further says, "The two other instructions asked and refused should have been given because, as already argued above, there was no violation of the statute either as to the hand rails or the treads." This point has already been covered, and in addition, it will be noticed that what the instructions were is not disclosed either by the brief or abstract. We are further of the opinion that there is no merit in appellant's contention that the amount of the judgment was excessive.

While we have gone into the merits of the case, there is another ground upon which the judgment should be affirmed. Appellant filed an inadequate abstract which did not comply with the rules of this court, and for that reason it was stricken from the files, and the court, on its own motion, allowed appellant further time within which to file a proper abstract of record. Instead of doing so, counsel for appel-

lant filed what he termed an "additional abstract of record," which merely attempted to supplement the abstract already stricken, and was, altogether, incomplete. As the abstract of record stricken from the files, and the additional abstract of record neither separately or together constituted a fair abstract, appellee was obliged to supplement this by still a further abstract. Appellant's failure to comply with the rule of court in regard to abstracts of record is, in itself, a ground for affirming the judgment.

The judgment of the Superior Court is affirmed.

AFFIRMED.

555 - 21953.

In the Matter of the Estate of MAX M. HESSER, Deceased,

Claim of CHARLES HUEGLIN, et al., Appellees,

vs.

SAID ESTATE, Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

205 I.A. 496

MR. JUSTICE GOODWIN delivered the opinion of the court.

By this appeal the administratrix seeks to reverse a judgment of the Circuit Court allowing the claim of the appellees to the extent of $1,500. It appears that the deceased and his brother were co-partners under the firm name of Hesser Brothers, and on December 5th, 1911, deceased, who had invented a wire form for holding clothes lines, gave an order to appellees for the manufacture of 100,000 of the forms at $33.75 a thousand; he signed the order "Hesser Bros., per Max M. Hesser." In January, 1912, he died, and on the following day, before appellant qualified as executrix, his brother had a talk with one of appellees; what was said is in dispute, but the testimony offered on behalf of appellees was to the effect that he directed appellees to stop all work on a machine which had been ordered for the purpose of manufacturing the wire forms. It further appears that appellees did so, and paid $800 for the work already done upon the machine, which could be completed by the expenditure of $150 more; that the uncompleted machine has no value except as scrap iron, and as such is not worth to exceed $25. A careful examination of the record further discloses abundant evidence which would justify a finding that both the deceased partner and the executrix, by their explicit statements, their actions, and the statements and actions of the attorney for the executrix, expressed a distinct, unequivocal, and absolute refusal to perform the

In the matter of the estate of
MAX M. RIDGE, Deceased,

Adam of CHARLES MUENCH, et al.,
Appellees,

vs.

SAID RIDGE, Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN delivered the opinion of the court.

By this appeal the administratrix seeks to reverse a judgment of the Circuit Court allowing the claim of the appellees to the extent of $1,800. It appears that the deceased and his brother were co-partners under the firm name of Ridge Brothers, and on December 5th, 1911, deceased, who had invented a wire form for holding clothes lines, gave an order to appellees for the manufacture of 100,000 of the forms at $24.75 a thousand; he signed the order "Ridge Bros., per Max M. Ridge." In January, 1912, he died, and on the following day, before appellant qualified as executrix, his brother had a talk with one of appellees; what was said is in dispute, but the testimony offered on behalf of appellees was to the effect that he directed appellees to stop all work on a machine which had been ordered for the purpose of manufacturing the wire forms. It further appears that appellees did so, and paid $800 for the work already done upon the machine, which could be completed by the expenditure of $180 more; that the uncompleted machine has no value except as scrap iron, and as such is not worth to exceed $50. A careful examination of the record further discloses competent evidence which would justify a finding that both the deceased partner and the executrix, by their explicit statements, their actions, and the statements and actions of the attorney for the executrix, expressed a distrust, unwillingness, and absolute refusal to perform the

contract, and that the negotiations between the parties were for the sole purpose of reducing or avoiding appellee's damages. We are also of the opinion that the evidence is sufficient to sustain the court's finding in regard to the amount of damages. In this state of the record, the judgment of the Circuit Court must be affirmed.

AFFIRMED.

-6-

contract, and that the negotiations between the parties were for the sole purpose of reducing or avoiding appellee's damages. We are also of the opinion that the evidence is sufficient to sustain the court's finding in regard to the amount of damages. In this state of the record, the judgment of the District Court must be affirmed.

AFFIRMED.

583 - 21981.

JENNIE CHAPMAN,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 497

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks the reversal of a judgment against it for $3,500, on account of personal injuries suffered by the appellee, as the result of being hit by one of appellant's cars. The evidence on behalf of appellee tended to show that while she was crossing a street at a well-lighted street intersection, and at a late hour in the night, she fell on the icy pavement, between the rails of the south-bound track, and before she was able to get up and get out of the way, she was struck by a south-bound car running at a speed of from twenty to twenty-five miles an hour, and which was over 150 feet away at the time she fell. Appellee contends that the circumstances were consistent with a finding that she was in the exercise of ordinary care for her own safety, and that in any event the street railway company had a clear chance to avoid injuring her after she was in a position where she could not, by any exercise of care, extricate herself from the danger. Appellee's evidence further tended to show that she was, at the time, in a sober condition.

The evidence on behalf of appellant, on the other hand, tended to show that when the car, which was being operated at a speed of from ten to twelve miles an hour, was about 20 feet from appellee, she, without warning, suddenly stepped in front of the car; that there was nothing to indicate to the motorman that she was intoxicated or intended to step in front of the car, but that it subsequently appeared that she was, at the

time, in an intoxicated condition. It was, and is, the contention of the appellant that the injury was not the result of negligence on the part of appellant, but was due to appellee's failure to use ordinary care for her own safety, on account of her intoxicated condition. The question, therefore, of whether appellee was intoxicated, and the effect of her intoxication, if she was intoxicated, was an important element in the case. With this evidence before the jury, the court gave the following instruction:

> "The court instructs the jury that while evidence of voluntary intoxication is competent to be considered by the jury in determining whether the person was taking that care of his safety which a reasonably prudent man or woman, who was sober, would take under the same circumstances, it does not of itself constitute contributory negligence."

The instruction is clearly argumentative in form, and is, in our opinion, misleading. While it is true that voluntary intoxication "does not of itself constitute contributory negligence," it is necessarily often the explanatory fact which must determine the question of whether a person was or was not exercising ordinary care at a given time. While the instruction tells the jury that it may consider voluntary intoxication "in determining whether the person was taking that care of his safety which a reasonably prudent man or woman, who was sober, would take under the same circumstances," it does not directly or by implication tell the jury that that was the degree of care which appellee was bound to take, whether she was intoxicated or sober. Counsel for appellee, in support of the instruction, say that it was taken from South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456. In that case, the instruction, which appears at p. 462, was as follows:

time, in an intoxicated condition. It was, and is, the contention of the appellant that the injury was not the result of negligence on the part of appellant, but was due to appellee's failure to use ordinary care for her own safety, on account of her intoxicated condition. The question, therefore, of whether appellee was intoxicated, and the effect of her intoxication, if she was intoxicated, was an important element in the case. With this evidence before the jury, the court gave the following instruction:

"The court instructs the jury that while evidence of voluntary intoxication is competent to be considered by the jury in determining whether the person was taking that care of his safety which a reasonably prudent man or woman, the man sober, would take under the same circumstances. It does not of itself constitute contributory negligence."

The instruction is clearly argumentative in form, and is, in our opinion, misleading. While it is true that voluntary intoxication "does not of itself constitute contributory negligence," it is necessarily often the explanation of fact which must determine the question of whether a person was or was not exercising ordinary care at a given time. While the instruction tells the jury that it may consider voluntary intoxication "in determining whether the person was taking that care of his safety which a reasonably prudent man or woman, the man sober, would take under the same circumstances," it does not directly or by implication tell the jury that that was the degree of care which appellee was bound to take, whether he was intoxicated or sober. Counsel for appellee, in support of the instruction, say that it was taken from South Chicago City Ry. Co. v. Pierson, 201 Ill. 494. In that case, the instruction, which appears at p. 498, was as follows:

"If it be the case that the plaintiff, at the time he was injured, was under the influence of liquor or intoxicated, nevertheless it does not follow that he cannot recover in this action. Whether he was under the influence of liquor or intoxicated is material only as bearing on the question of whether, in attempting to get on said car, he was, under the circumstances, exercising ordinary care, - that is, such care as prudent persons ordinarily exercise under like circumstances."

We think the substance of that instruction was, in effect, the same as that of the one now under consideration, and if the latter cannot be said to be a correct statement of the law, it follows that the same thing would be true of the former. But the court, in passing upon it, said:

"This instruction was objectionable for different reasons. In the first place, it was argumentative in form. Instructions should merely state the law for the guidance of the jury, and not employ the language of counsel in argument. It is not a proper form of instruction to tell a jury that although some material fact may exist, nevertheless it does not follow that the plaintiff has not got a good case, and thereby attempt to minimize or destroy the effect of legitimate evidence. Besides, the conclusion of contributory negligence which would defeat the action might or might not follow from the mere fact of intoxication, depending upon the degree of such intoxication."

Nevertheless, counsel for appellee in the case at bar insist that the instruction here is based upon the very language of the court in the case cited. That language was as follows:

"The evidence of intoxication was admissible as a fact tending to prove negligence on the part of the plaintiff. While voluntary intoxication does not constitute negligence in law, proof of the fact is competent to be considered in determining whether the person was taking that care for his safety which a reasonably prudent man who was sober would take under the same circumstances."

It is this last sentence which is relied upon as the basis of the instruction, but it will be seen that the language of the instruction is not the language of the court. Moreover, it is obvious that the language of an opinion which clearly states the law applicable to a case may be misleading to a jury when it is detached from the body of the opinion.

It will be noticed also that the instruction does not embody the preliminary statement of the court that "The evidence of intoxication was admissible as a fact tending to prove negligence on the part of the plaintiff." We are, therefore, of the opinion that the instruction did, in the language of the Supreme Court, "attempt to minimize or destroy the effect of legitimate evidence." Counsel, however, contend that even if the instruction is incomplete, still it was supplemented by instruction number twenty, which told the jury "that such intoxication or condition would not relieve the plaintiff from exercising the same degree of care for her own safety which a sober, ordinarily prudent, careful and cautious person would exercise under the same or like circumstances." The difficulty is that the instructions are detached and disconnected, and we cannot assume that the jury, as a matter of fact, considered the two together as one instruction. Counsel for appellee undertook to submit to the court an instruction to guide the jury in considering evidence as to the intoxication of the appellee, and it was incumbent upon him to state the effect of such evidence fully.

We are unable to accept counsel's further contention that an error in an instruction in regard to contributory negligence was immaterial for the reason that the jury might have decided the case upon the theory that the appellant had a clear opportunity to avoid the accident after it became impossible for the appellee to do so. From the instructions offered on behalf of both parties, it is clear that the case was not submitted to the jury upon any such theory, and we cannot decide the case upon an hypothesis that the jury decided it upon that theory, - an hypothesis which rests purely upon surmise and conjecture. Upon one theory of the case, and that the one upon which it was presented to the jury, it became material to determine whether the appellee was in the

exercise of ordinary care for her own safety at and before the time of the accident, and appellant was entitled to have the jury properly instructed upon that point. In arriving at the conclusion that the error in the instruction was fatal in this case, and was not cured by the other instruction referred to, we are not deciding that an erroneous instruction may not, in a proper case, be considered as cured by another instruction, or that an error such as the one referred to here would, in every case, be necessarily erroneous. We do decide, however, that in view of the sharply conflicting testimony in the case, and the importance which necessarily attached to the evidence concerning the question of whether or not appellee was intoxicated, the instruction given tended to mislead the jury in regard to a matter of importance.

The judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MR. PRESIDING JUSTICE O'CONNOR dissenting:

In my opinion, the jury clearly understood from the instructions taken as a series that an intoxicated person was required to use the same degree of care and caution for his or her own safety as that required of a sober person.

In my opinion, the jury clearly understood from the instructions taken as a whole that an intoxicated person was required to use the same degree of care and caution for his or her own safety as that required of a sober person.

600 - 21998.

MARY T. CASE, an insane person, and FRANCES PIRASE, her conservatrix, Appellees,

vs.

JOHN E. CASE, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

205 I.A. 507

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks to reverse an order modifying appellee's allowance for temporary alimony by increasing it from $30 to $50 a month. It appears that the original decree of divorce was granted to the appellee in 1903 on grounds of adultery, and appellant was required to pay her $2,000 in cash, and $75 a month as alimony, together with costs, solicitor's fees, etc. A modification of the decree reducing the alimony to $30 a month was obtained three years thereafter upon a stipulation signed by the parties themselves. Appellant did, however, pay appellee $50 a month until November, 1914. A part of this was in payment of money owing appellee, and appellant claims that the rest was on the understanding that he should have credit for the amounts paid in excess of $30 a month. March 9, 1915, a conservatrix of the appellee presented her petition on behalf of the appellee, in which she stated that appellant had persuaded appellee to consent to a reduction in the alimony by threatening that he would leave Chicago and remain out of the jurisdiction of the court, and would pay her no part of the alimony or other moneys due from him to her, unless the reduction was made. The petition further recited that appellee was and had been for a long time insane; that appellant was earning a salary of $250 a month, and that the needs of the appellee were such that the alimony should be restored to $75 a month. Appellant replied, stating, among other things, that appellee, on the 19th of

November, 1914, had the sum of $800 in the bank, and the further sum of $125 on her person, was the owner of a number of valuable diamonds and of household effects previously used in keeping house, and averred that this property had been converted into cash, and that the legitimate expenses of appellee were not more than $20 a month; he further stated that he was in debt to other persons in amounts aggregating over $300, and had no resources from which to pay except his salary. He denied that in 1906 he threatened to leave the jurisdiction of the court unless the alimony was reduced to $30 a month, but he does say that after his divorce he lost his position on account of ill health, and removed to the State of California, where he remained until the 1st of January, 1906; that upon his return to Chicago he owed appellee $525 borrowed money and interest thereon, $275 accrued alimony, and was without funds; that a company offered him a position at $40 a week; that he informed appellee of the offer of employment, and told her he could not accept it unless she would consent to a reduction of the alimony. Appellant further says that he has re-married; that he is living with his family, and that his present income is $45 a week.

The sole question which arises upon this record is as to whether the action of the court in decreeing the payment of $50 a month alimony was, in all the circumstances, erroneous. When it is remembered that from 1906 until 1914 the appellant had found himself able to pay $50 a month, and that he was receiving $45 a week, and that appellee is an insane person entitled to all the attention that the means of appellant would justify, we are unable to say that the order of the chancellor was erroneous.

The order of the Circuit Court is affirmed.

AFFIRMED.

2776

299 - 21695

JOHN G. O'NEIL,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
Defendant in Error.

} W ERROR TO
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 508

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a writ of Error to the Superior Court by the plaintiff in error, (hereafter called the plaintiff), to reverse a judgment for costs against him in the Superior Court of Cook County, in favor of the City of Chicago, defendant in error, (hereafter called the defendant).

The City of Chicago desired to replace certain boilers and machinery for creating steam power at its Lake View Pumping Station. The Commissioner of Public Works prepared a set of specifications and a plan showing the location and connections of the boilers. Bids were asked for and the following were submitted:

John Mohr & Sons.....$42,000.00
SpringfieldBoiler Works..... 40,992.00
John O'Neil..... 45,550.00

The bid of O'Neil, plaintiff was accepted, and a contract entered into by said parties on February 2nd, 1905.

Shortly afterwards, on February 16th, 1905, John Mohr filed a bill for an injunction in the Circuit

5021.M.308

Mr. Justice Darling delivered the opinion of the court.

This is a suit of Error to the Superior Court of the County of ——, (Butterfat, Judge) the plaintiff, by Service a Judgment for moneys alleged due on the Indemnity Bond of Jack Dunkly, in favor of the City of Dirigo, defendant in error. (Interlocutory matters omitted).

The City of Dirigo desired to replace certain worlds and maintenance for operating steam power at the Dirigo Flow Pumping Station. The Commissioners of Public Buildings & Ways of Dirigo and a plan showing the location and construction of the boilers. Also made offer for and the following more elaborate:

Dirigo Iron & Steel.....	$ 2,000.00
Pittsfield Boiler Works.....	1,800.00
Dirigo Tube & Boiler.....	1,650.00

The job at $1,650, plaintiff was accepted, and a contract executed upon by both parties on February 3rd, 1910.

Shortly afterward, on February 11th, 1910, [illegible] a bill for an injunction in the Circuit

[illegible]

Plaintiff in Error.

vs.

Defendant in Error.

Error to Circuit Court.

Court, alleging that the contract with O'Neil was illegal and void, because it failed to comply with the statutes requiring competitive bidding, and with the city ordinances, and asked for an injunction against the City of Chicago and plaintiff, O'Neil, enjoining them from proceeding with the work under the contract.

The matter was referred to Master in Chancery Leaming, who recommended that a temporary writ of injunction be issued; and on the recommendation of the Master, and after hearing argument of counsel, Judge Tuley entered an order for a temporary injunction. Afterwards, in the June Term 1905, on oral and documentary evidence that took several days, Judge Tuley gave an oral opinion directing the entry of a final decree granting a perpetual injunction against the City of Chicago and O'Neil, in accordance with the bill of complaint. Before a final decree or other order was entered, Judge Tuley was taken ill and died. While the suit was still pending, the City re-advertised the work and on October 12th, 1905, again entered into a written contract with plaintiff to do substantialy the same work. The terms of the contract were carried out and the work finished by him. On August 31st, 1907, said suit of John Mohr was dismissed, on stipulation of the parties, and the bond cancelled.

Plaintiff claims that his wrongful exclusion from the performance of his contract by the City of Chicago caused him great loss. He therefore began the present suit. His declaration consisted of the common counts, and a special count, alleging the contract. Later he filed a bill of particulars setting forth the several items of

damage sustained, and afterwards an additional count setting out in full the contract alleged to have been broken.

The additional count alleges that the City was operating a certain Water Works plant from the Lake View pumping station; that it was selling water tothe public and had a surplus for betterments and renewals for this and other water works; that the plaintiff entered into a contract by which the defendant engaged the plaintiff to furnish materials and machinery and to perform the work required in the construction of this pumping station; that the defendant promised to pay the plaintiff for such services as he might render under the contract and any damages plaintiff might sustain in the event the defendant should cancel such contract and exclude the plaintiff from the performance thereof; that he became possessed of tools and material and furnished labor whereby he spent the sum of $20,000.00, and that without any just or reasonable cause the defendant discharged the plaintiff from its employment and the performance of services under said agreement.

To the original declaration, defendant filed a plea of the general issue, on which issue was joined. Altogether eight pleas were filed. Of these only the 4th, 5th, 6th and 8th are discussed in the briefs of counsel, and we shall confine our opinion to them only.

The fourth plea sets up an ordinance of the City of Chicago providing for the submission of contract work to public bidding, advertising, etc., and providing for giving contracts to the lowest and best responsible bidder. It further averred that the plaintiff "was not

the lowest reliable and responsible bidder." Plaintiff replied to this plea, and the defendant demurred to the replication and the demurrer was sustained and leave given to file an amended replication and to reply double. In accordance with leave granted plaintiff filed an amended replication in which he alleged that he was the lowest responsible and reliable bidder and that the commissioner of public works in the proper exercise of the discretion and authority vested in him found and decided that the plaintiff was the lowest reliable and responsible bidder and that the contract was awarded to the plaintiff fairly and in good faith.

To the replication the defendant filed a general demurrer, which demurrer the court sustained, and plaintiff elected to stand on said replication.

The fifth plea sets up certain ordinances of the City of Chicago providing for the manner in which the commissioner of public works should prepare plans and specifications for public work to be done under contract and alleging, that it "was the duty of said Commissioner of Public Works, under said ordinances to prepare a plan or profile of the work so definite and sufficiently detailed that bidders would be able to determine therefrom the particular work to be done to the end that the specifications and plans on file with the said Commissioners of Public Works would give full and definite information of the precise work to be done so as to form a basis for intelligent, competitive bidding by contractors and others desiring to bid on such work,"

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the lowest reliable and responsible bidder." Plaintiff

and further alleging that the Commissioner of Public Works prepare a plan or profile that was insufficient under the ordinances, and under which there could be no competitive bidding, for which reason the contract awarded to plaintiff was void.

To this plea plaintiff filed a replication, to which defendant demurred, and its demurrer was sustained, and plaintiff was given leave to file an amended replication and to reply double. In accordance with the leave granted plaintiff filed an amended replication denying the allegations of the plea, and alleging that the plans, profile and specifications prepared by the Commissioner of Public Works were sufficient to furnish a proper basis for competitive bidding, and denying that each bidder based his bid on his own plans, and alleging that there was uniformity in relation to the work to be bid on by the different bidders. To this replication the defendant filed a general demurrer, which was sustained, and plaintiff elected not to reply further.

The Sixth plea sets up certain ordinances of the City of Chicago providing for the manner of letting contracts for public works, and alleging that under said ordinances it was the duty of the Commissioner of Public Works to award the contract "to the lowest reliable and responsible bidder". The plea further set up certain provisions in the specifications for the work in question, providing that the bidders should in their respective bids set forth a description of certain appliances in connection with the boilers they proposed to furnish, and drawings

showing dimensions of masonry, foundations wall, etc. necessary to install the boilers they proposed to furnish.

It was alleged that under this provision of the specifications the several bidders furnished plans showing the manner of installing the boilers and that their several proposals were so varied that it was impossible for the Commissioner of Public Works to arrive at a conclusion as to which was "the lowest responsible bidder", for which reason it is alleged that the contract was void.

To this plea the plaintiff filed a replication denying that the plans furnished by the several bidders showing the manner in which they proposed to perform the work in question were varied and not alike as alleged in the plea, and alleging that what are referred to as plans furnished by the bidders were "working plans" submitted by the several bidders showing the manner in which they proposed to perform the work on which they respectively filed bids, and that such so-called plans were not intended to alter or vary the plans and specifications of the contract, but were required to be furnished with their bids for the purpose of furnishing information concerning the skill and ability of the bidders to perform the work contemplated.

To this replication the defendant demurred and its demurrer was sustained, and plaintiff elected not to reply further to this plea.

The Eighth plea alleged that after said contract was made between plaintiff and defendant, that

-4-

mooring dimensions of economy, dimensions well, etc.
necessary to install the boiler ship perhaps to
forward.

It was alleged that many ships existing at
the installations the present station facilities given
showing the necessity of installing the boilers and that
their removal elsewhere were to result till it was im-
possible for the Commissioners of public works to supply
it a condition to be kept in mind "the Zoned ingredients
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In this plan the physical lines & relations
remain, that the plans Executive of the several pierhead
to the plans furnished by the pilots were "putting
plans" submitted to the several pilots existing the
existing the moorings to which ship proposed to pattern
the most it question were noted and not alike be ex-
tended to the plan, and adopting that may selected
and no doubt intelligently this may be changed
to be made tentative only.

The height plan existing that after mak-
ing the location of the pierhead lines the bulkhead
and the channel lines, and then made ac-
cording to the pierhead lines existing the
outlay plans were not finished in plan at only the
of recovering information concerning the still new
during to be furnished with their the interest
plans and classification of the section, but were in-
cluded at the request to replace the work contemplated.

To take particular the relevant channel
and the boundary was surveyed, and plentiful efforts
not to rely further it into plan.

one Joseph Mohr, a taxpayer, (who was one of the unsuccessful bidders on the contract), filed his bill in the Circuit Court of Cook County, setting up the signing of said contract, and alleging that the same was void, and praying among other things for a writ of injunction against the City of Chicago, its Commissioner of Public Works and the plaintiff herein, to enjoin the carrying out of said contract, or paying out any money of the City of Chicago to the plaintiff herein under said contract; that a motion for a temporary injunction was made and referred to a master in chancery; that said master recommended that a temporary injunction issue as prayed for by said bill; that a temporary injunction was issued in accordance with the prayer of the bill; that answers were filed and the cause put at issue and heard by the chancellor, the late Judge Tuley. It is then alleged that Judge Tuley rendered a decision which alleged decision is set out at length; that Judge Tuley died before entering any final order or decree in said cause, and that no final decree was ever entered in said cause, and that thereafter said cause was dismissed, no costs being taxed against either party, and the bond given by the complainant was ordered canceled and withdrawn; that the plaintiff and defendant herein proceeded no further in carrying out said contract.

The statement of his views on the issues in the chancery cause by Judge Tuley, but without any finding or decree, are set up as a bar by way of estoppel to plaintiff's right of action herein.

To this plea plaintiff filed a replication to which defendant demurred, and its demurrer was sus-

tained and leave given plaintiff to file an amended replication and to reply double.

In accordance with leave granted, plaintiff filed an amended replication alleging that no final verdict, judgment or decision was ever entered in said chancery cause of Mohr v. City of Chicago; that plaintiff was never enjoined from carrying out said contract; that said temporary injunction was dissolved; that the chancellor did not render an opinion in the words and figures as alleged in said plea; that the plaintiff did not treat or consider the statement made by Judge Tuley as equivalent to a final decree, and that the plaintiff did not acquiesce in said alleged opinion of Judge Tuley; that the defendant herein did not without protest on the part of the plaintiff proceed to readvertise for bids for constructing said pumping station; that the contract subsequently let by the defendant after readvertising for bids was not for the same identical work as is alleged in said plea; denies that to avoid the expense of said chancery suit, the plaintiff stipulated with the defendant City of Chicago, and with Mohr the complainant in said suit, that said suit might be dismissed without costs; and denies each allegation of fact set up in said plea, and denies that he is estopped by anything in said plea alleged, etc.

To this replication defendant filed a general demurrer, which was sustained, and plaintiff elected not to reply further to said plea.

The court entered judgment against plaintiff for failure to further reply after demurrers were sustained to his replication to the 6th special plea, and to his amended replications to the 4th, 5th and 8th special pleas.

The plaintiff contends that the order of the trial judge should be reversed. The errors which are relied upon by the plaintiff as justifying a reversal of the final order of judgment are as follows:

1st: That the amended replications of the 4th, 6th and 8th special pleas were each sufficient denials of the facts alleged therein and to each plea tendered an issue of fact. That the replication to the 6th special plea was a sufficient denial of the facts alleged therein and presented an issue of fact.

2nd: That each of the four pleas above mentioned were bad and the demurrers to the replications should be carried back and sustained as demurrers to the pleas with judgment for the plaintiff.

We shall take up the main points arising from the pleadings, (4th, 5th, 6th and 8th pleas) briefly stated, in their order, as follows:

1st: Plaintiff was not the lowest reliable and responsible bidder.

2nd: The Commissioner caused to be prepared a plan or profile of the work, and specifications which were informal, insufficient and incomplete and therefore illegal and void.

3rd: Plans and specifications were demanded from each bidder. That those furnished by them were so varied and different from each other "that it was impossible

to arrive at the conclusion as to which was the lowest responsible bidder."

4th: That the proceedings before Judge Tuley in Mohr v. City of Chicago, and the final disposition of the case estopped the plaintiff from the present action.

As to special plea number four: The statutory provision applicable, provides that all such contracts as the one in question "shall be let to the lowest responsible bidder," and that "in all cases the Council or Board of Trustees, as the case may be, shall have the right to reject any and all bids that may not be satisfactory to them."

Section 1611 of the Revised Code of Chicago, 1897, Vol. 1, provides that such contracts "shall be let to the lowest responsible bidder."

Section 1612, under the heading "Improvement by Special Assessment - Contract," provides that "a plan or profile of the work to be done, accompanied with specifications for the doing of the same, shall be first placed on file in the office of said (Public Works) department."

Section 1626 provides that when such a contract "is to be paid out of the general fund, or the water or sewage fund" the contract shall be let in the same manner as under the special assessment provision.

The legislature and city council evidently tried to safeguard the letting of municipal building contracts to stop fraud and favoritism and restrict the discretionary power of the Commissioner of Public Works to the minimum. The authorities on this subject uniformly

support them, some even going so far as to hold "all discretion is withheld from the contracting officer."

The clear intention expressed in the sections quoted is that a contract for public work shall be let so that nothing is left for the Commissioner but to decide who is the lowest responsible bidder, "as among bidders equally responsible the work cannot lawfully be awarded to one who is not the lowest bidder." Sanitary Dist. v. See, 79 Ill. App. 169. In the case at bar plaintiff's bid was accepted, though his was the highest bid made, and defendant argues that it was void therefor. The same question arose in Hallett v. City of Elgin, 254 Ill. 343, and the court held "that the statutory requirement that contracts for public improvements shall be let to the lowest responsible bidder does not require the letting of a contract to the lowest bidder upon the ascertainment of his financial responsibility only, but the term 'responsible' includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the terms of the contract," citing People v. Kent, 160 Ill. 655. The 4th special plea of defendant fails to aver that either of the refused bidders was a "reliable and responsible bidder" and simply avers a conclusion that plaintiff was not the lowest reliable and responsible bidder. This was expressly traversed by plaintiff in his amended replication where he sets forth at length the reasons why the Commissioner accepted the plaintiff's bid and why he did not accept either of the other bids.

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Applying the law we believe the 4th special plea was bad and the trial judge erred in sustaining a demurrer to the amended replication thereto.

As to plea number five; that the specifications and plan of the Commissioner were not sufficiently definite and in detail to comply with the city ordinances and statutes mentioned above. The plan in the present case, as shown by a blue print exhibit, is, as defendant describes it "scarcely more than a general outline of the available space where the boilers, to be furnished under the contract, were to be placed." A plan has been described as "a design, a delineation or projection on a plane surface, of the ground lines of a structure, which are reduced in size, the relative proportions being preserved." To the non-expert, the plan offered, we may safely assume, would be considered sufficient. In the opinion of Judge Tuley, however, when passing on this matter in Mohr v. City, he said, "It is the boldest attempt to substitute no plan for that required by the law that I have met with." Considerable stress is laid on this opinion, and it is set out in full in defendant's brief and quoted aptly and often. Yet we reluctantly have to admit it is neither law nor evidence in this case. We gather from the pleadings that the chancellor had a hearing on the matter that lasted several days, during which time we may safely assume, expert testimony was introduced to enlighten the court and aid it in reaching a correct conclusion. Such is not the fact in the case at bar. The only evidence before this court is the blue print plan mentioned and specifications covering about 40 pages of the abstract.

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The authorities cited by defendant's counsel are nearly all in equity where the court heard testimony. This is a common law proceeding and the sufficiency of this plan and the specifications is a question of fact that cannot be passed on by this court. We are of the opinion that plaintiff's amended replication to the 5th plea tendered an issue of fact and that the court erred in sustaining a demurrer thereto.

As to plea number six: This plea set out the city ordinances mentioned, and that portion of the specifications which required bidders to furnish their own complete and detailed plans and specifications of the boilers they proposed to furnish. That the different bidders sent in plans and specifications so varied and unlike that it was impossible for the Commissioner to make a comparison as to which was the best bid. Plaintiff filed a replication allaging the plans and specifications furnished by bidders were only "working plans" and required for the purpose of furnishing information concerning the skill and ability of the bidders to perform the work. Plaintiff after demurrer was sustained to this replication got leave to reply over, double, but as he admits, by an oversight failed to do so, We are of the opinion that this demurrer should have been carried back and sustained as a demurrer to the plea.

As to plea number eight: That the proceedings in Mohr v. City of Chicago, acted as a estoppel, we must hold that there is nothing before this court to show that plaintiff was estopped in the present suit by anything that took place in that connection. It is admitted, as we have noted, that unfortunately Judge Tuley was taken

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ill and died after rendering an oral opinion, and before a decree was entered. There can be no estoppel until a final decree is entered. Quinn v. McMahon, 40 Ill. App. 593.

It is further averred in this plea that plaintiff acquiesced in the ruling of Judge Tuley, and treated it as a final decree and subsequently on October 21, 1905, made a new contract for the same work, which complied with the statutes and city ordinances; that the work was performed and paid for; that no claim was made under the old contract, and on August 31, 1907, plaintiff signed a stipulation to dismiss the suit, and the suit was accordingly dismissed. The amended replication to this plea traversed each material averment and set up other facts. Counsel for defendant asserts that the "replications to this plea fail to negative all of the elements of estoppel." With the latter assertion we do not agree.

For the reasons set forth in the foregoing opinion the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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For the reasons set forth in the foregoing opinion the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

508 - 21906

ELIAS HOLLENBACH and MARTHA HOLLENBACH,

Appellees,

vs.

ELLEN A. HARDIN, PATRICK K. HARDIN and F. W. LELAND,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

205 I.A. 528

MR. JUSTICE TAYLOR delivered the opinion of the court.

The appellees recovered a judgment for $100.00 against the appellants, for damages done to the premises of appellees in taking a safe from said premises.

The evidence shows that one of the appellants, Patrick K. Hardin, desiring to have a certain safe, which belonged to him, and which was on the premises of appellees, sent the appellant, F. W. Leland, a licensed expressman, to the premises of appellees in order to find out what he, Leland, would charge for moving the safe which was on the premises and belonged to the appellant, Patrick K. Hardin; that Leland informed Patrick K. Hardin that he would go over and get the safe that afternoon, for $5.00; that Hardin then told Leland to go over and get the safe from the premises of Hollenbach, which were known as street number 5470 Madison Avenue; that Leland took a single wagon and the usual paraphernalia for moving safes and went over to the premises, and finding no one

B&B - 2360

MILAS KOLLIMBACH and MARTHA
KOLLIMBACH,

Appellees.

APPEAL FROM

vs.

SUPERIOR COURT.

COOK COUNTY.

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HARDIN and F. LELAND,

Appellants.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The appellees recovered a judgment for $100.00 against the appellants, for damages done to the premises of appellees in taking a sale from said premises.

The evidence shows that one of the appellants, Patrick K. Hardin, desiring to have a certain sale, which belonged to him, and which was on the premises of appellees, sent the appellant, F. W. Leland, a licensed auctioneer, to the premises of appellees in order to find out what he, Leland, would charge for moving the sale which was on the premises and belonged to the appellant, Patrick K. Hardin; that Leland informed Patrick K. Hardin that he would do over one set the sale that afternoon, for $2.00; that Hardin then told Leland to go over and get the sale from the premises of Williamson, which were known as street number 5427 Madison Avenue; that Leland took a single wagon and the usual paraphernalia for moving sales and went over to the premises, and finding no one

at home, opened one of the windows,and together with four helpers that he had with him, using a block and tackle, got out the safe which weighed about 1800 pounds, and took it from the premises. The evidence shows further that Leland had some difficulty in getting the safe out and that a certain amount of injury was done to the house and premises.

There is some conflict in the testimony as to the right to remove the safe in the absence of appellees from the premises. Elias Hollenbach, one of the appellees, testified that he told Hardin at four different times to take the safe out; that on the fourth occasion he took his attorney along and told Hardin to take the safe out within thirty days or he would sell if for the charges; that he told him to let him know when he went so he could be at home. On the other hand, Patrick K. Hardin, one of the appellants, testified that when he told Hollenbach he was going to leave the safe there until some future time, Hollenbach said "all right, leave it there as long as you want to;" that at a later date Hollenbach telephoned him and asked him if he would move the safe out, to which Hardin answered "yes, I will give the teamster an order to go over there and get it;" that he, Hardin, said "can they get in all right" and that Hollenbach answered "yes, he can get in at any time;" that on another occasion he said to Hollenbach "I can't say what date the man will be there, when he goes after the safe he can get it?" and that Hollenbach answered "yes".

The question which seems to be decisive of the appeal is whether appellants, Ellen A. Hardin and Patrick K. Hardin

at home, opened one of the windows,and together with four helpers that he had with him, using a block and tackle, got out the safe which weighed about 1800 pounds, and took it from the premises. The evidence above further that Delmond had some difficulty in getting the safe out and that a certain amount of injury was done to the house and premises.

There is some conflict in the testimony as to the right to remove the safe in the absence of appellees from the premises. Mike Hollenbeck, one of the appellees, testified that he told Martin at four different times to take the safe out; that on the fourth occasion he took his attorney along and told Martin to take the safe out within thirty days or he would sell it for the charges; that he told him to let him know when he want so he could be at home. On the other hand, Patrick E. Martin, one of the appellants, testified that when he told Hollenbeck he was going to leave the safe there until some future time, Hollenbeck said "all right, leave it there as long as you want to;" that at a later date Hollenbeck telephoned him and asked him if he would move the safe out, to which Martin answered "Yes, I will give the teamster my order to go over there and get it;" that he, Martin, said "soon they get in all right" and that Hollenbeck answered "Yes, he can get in at any time;" that no another occasion he said to Hollenbeck "I don't c any what date the man will be there, when he goes after the safe is one get it?" and that Hollenbeck answered "Yes".

The question which seems to be decisive of the

K. Hardin, who were not present at the alleged trespass, and Leland, being in the nature of a contractor, are liable jointly.

In Hale, et al v. Johnson, 88 Ill. 185, the court said, while a master is responsible for injuries arising from the negligence of his servant, it is the doctrine that a party who has contracted for the doing of certain work for his use and benefit, is not liable for injuries arising in the performance of such work. The court in that case quotes from Shearman and Redfield the following language:

> "One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant." Wadsworth-Howland Co. v. Foster, 50 Ill. App. 513; Arasmith v. Temple, 11 Ill. App. 39; Foster v. Wadsworth-Howland Co., 168 Ill. 514."

There is no evidence that appellants, Ellen A. Hardin and Patrick K. Hardin, commanded or sanctioned the trespass, and, therefore, the burden was upon the appellees to prove that they were, as a matter of law and fact, responsible for the trespass. We have examined the cases cited by appellee, and do not find that any of them announce a principle of law which, if applied to the facts in the instant case, would require the conclusion that Ellen A. Hardin and Patrick K. Hardin were liable for the trespass of the appellant, Leland. It cannot be contended that the Hardins, after the employment of Leland, a licensed expressman, had any control over the manner in which Leland would do his work. Leland in undertaking to remove the safe,

K. Martin, who were not present at the alleged trespass, and Leland, being in the nature of a contractor, are liable jointly.

In Hale, 17 Ky. L. Rep., 49 Ill. Inf., the court said, while a master is responsible for injuries arising from the negligence of his servants, it is the doctrine that a party who has contracted for the doing of certain work for his use and benefit, is not liable for injuries arising in the performance of such work. The court in that case quotes from Sherman and Redfield the following language:

> "One who undertakes to do a specific piece of work, furnishing his own materials and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is simply a contractor and not a servant." Tuberville v. Stamps, 1 Ld. Raym. 264; Taylor v. Peckham, 10 Conn. 139 Ill. 514.

There is no evidence that appellants, Allen A. Martin and Patrick K. Martin, commanded or exercised the trespass, and, therefore, the burden was upon the appellees to prove that they were, as a matter of law and fact, responsible for the trespass. We have examined the cases cited by appellee, and do not find that any of them announce a principle of law which, if applied to the facts in the instant case, would require the conclusion that either A. Martin or K. Martin were liable for the trespass of the appellant, Leland. It seems to be conceded that the Martins, after the employment of Leland, a licensed electrician, had any control over the manner in which Leland would do his work. Leland in undertaking to remove the safe,

was entirely free from the control of the Hardins; in other words, he was a contractor with a definite specific piece of work to do. That piece of work he undertook, furnishing his own assistants, and executing the work entirely according to his own notions and adopting whatever methods he, as a regular expressman, thought best. Under the circumstances, there was no relation of master and servant, and the Hardins cannot be considered as in any way connected with or liable for the alleged trespass. Considering the testimony of Elias Hollenbach and Patrick K. Hardin, as it bears on the right of the latter, to have the safe taken away from the premises, obviously Patrick K. Hardin cannot be considered, when merely directing Leland to get the safe, as authorizing a trespass.

The judgment being unauthorized as against the appellants, Ellen A. Hardin and Patrick K. Hardin, it must be reversed. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

was entirely free from the control of the Darlins; in other words, he was a contractor with a definite specific piece of work to do. That piece of work he undertook, furnishing his own assistants, and executing the work entirely according to his own notions and anything whatever method he, as a regular experienced, thought best. Under the circumstances, there was no relation of master and servant, and the Darlins cannot be considered as in any way connected with - liable for the alleged trespass. Considering the penalty of Time Refinement and Patrick K. Darlin, as it bears on the right of the latter, to have the sale taken away from the premises, obviously Patrick K. Darlin cannot be sanctioned, even morally directing Leland to get the sale, to authorizing a trespass.

The judgment being unauthorized on rights the appellants, Silas V. Darlin and Patrick K. Darlin, it must be reversed. The judgment is therefore reversed and the cause remanded.

ELIJAH VAN DARLIN.

629 - 22027

SAM DIAMOND,
Appellee,

vs.

MAX GOLDSTEIN and
SARAH GOLDSTEIN,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 533

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 6, 1913, one Isadore [illegible]ler burglarized the place of business of the appellee, and took therefrom a quantity of furs. The furs were put in a barn at Tay[illegible] and Laflin Street, and subsequently sold to appellants. On March 28, 1914, appellee began an action of trespass on the case, in the Municipal Court, against the appellants, (to use the language of the statement of claim) "for unlawfully, fraudulently and maliciously converting and appropriating to their own use the property of plaintiff, consisting of the following: 122 pieces of furs, 1 persian lamb coat with ermine collar, and miscellaneous lot of dress goods (exact number of yds. unknown) of the total value of $1500, said conversion having occurred on to-wit, October 7, 1913."

The case was tried before a jury and a verdict rendered in the sum of $1747.55 against the appellants, and subsequently a remittitur of $75.00 having been allowed by the appellee, judgment was rendered for the balance, in his favor and against the appellants.

It is contended by the appellants that the court did not have jurisdiction because the statement of claim was for "unlawfully, fraudulently and maliciously converting certain property of the appellee." Admitting, however, as appellants do that the statute creating the Municipal Court gave it jurisdiction in actions for the recovery of damages for the conversion of personal property, we are of the opinion that the use of the adverbs, unlawfully, fraudulently and maliciously, do not change the nature of the charge against the appellants. The suit was for a conversion of appellee's property, and of that the Municipal Court had jurisdiction.

It is contended, further, by the appellants that the judgment should be reversed because the evidence does not support the judgment. The testimony of the appellee shows what furs he had in his possession and what was taken from him; and the testimony of Wexler that the furs he stole were listed by his so-called partner, Dressler, and that "he had everything on the list" which was shown to Goldstein when the sale was being made by Wexler to Goldstein, is sufficient identification and enumeration of the merchandise to justify the jury in concluding what furs belonging to appellee were actually received and converted by appellants.

It is contended, further, by the appellants that the court erred in admitting improper evidence on behalf of appellee. The appellee, as a witness, was asked on re-direct examination, by his counsel, "have you computed the fair reasonable market value of all these furs," and he answered "yes, sir." He was then asked "what does it amount to," which question was objected to and the objection overruled.

The witness answered, "$1625.00." The record does not show on what the objection was based, but it is evident from the brief of appellants that appellants claim is that the evidence did not sufficiently show what furs were comprehended or meant by the words "these furs." Inasmuch as the evidence in the record shows that not only appellee but appellants must have known exactly to what furs reference was made, we do not think the contention well founded.

It is contended, further, by the appellants that the statement of claim charged them with a criminal act, namely, receiving stolen goods, knowing them to have been stolen. We are of the opinion, however, that the words used in the statement of claim do not necessarily charge a crime, and, therefore, appellee was required to establish the material issues in the case only by a preponderance of the evidence. Germania Fire Insurance Co. v. Klewer, 129 Ill. 599; Solomon v. Buechele, 119 Ill. App. 595.

It is contended, further, that the conduct of counsel for the appellee, in the course of the trial, was ground for reversal. We are unable, however, upon an examination of the record to discover anything in the conduct referred to which called for serious objection, or which would justify considering it a sufficient error.

Upon an examination of the instructions which are complained of by the appellants, we do not find any material error. The judgment is affirmed.

AFFIRMED.

AFFIRMED.

482 - 22442

CHICAGO & VICINITY HUNGARIAN BENEVOLENT SOCIETY, a corporation (complainant),

Appellee,

vs.

CHICAGO & SUBURB HUNGARIAN AID SOCIETY, a corporation (defendant),

ALPHONSE LEFKOW,

Appellant.

Appeal of Alphonse Lefkow for order of commitment for contempt of court.

SUPERIOR COURT, COOK COUNTY.

205 I.A. 535

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a final order entered on October 11, 1915, by a chancellor of the Superior Court of Cook County, which adjudged the appellant, Alphonse Lefkow, guilty of contempt of court for failure to pay over to the clerk of the court the sum of $616.33, as required by order of said court entered on July 13, 1915.

The critical question in the case is whether the chancellor had authority to order the appellant to pay over a certain sum of money to the clerk of the court, and in default thereof to order him committed for contempt of court.

On February 13, 1915, the appellee filed a bill of review, (which was subsequently amended), which set forth, substantially, the history of the prior suit and the final decree therein, which latter decree (hereinafter called the original decree) provided, among other things, that the clerk of the court out of certain funds in his hands, pay to the appellant the sum of $500.00, for his reasonable

Appellant.

Appeal of Viphouse Telfax

for order of contempt

for contempt of court.

attorney's fees and certain costs, and in satisfaction of a certain judgment, and further pay to appellant out of said fund, the sum of $116.33. Prior to the entry of the original decree and in that suit, there had been paid in to the clerk of the court by certain quasi interpleading defendants, the sum of $2871.35. The original cause had been referred to a master in chancery, and evidence had been taken before him and a report made, and in accordance with the findings of the master a decree was framed, which was approved in writing by all the parties, or their solicitors of record in the case. The bill of review charged that the appellant was guilty of fraud in providing in the original decree that certain sums should be paid to him personally, and in obtaining from the clerk of the court, although pursuant to the actual terms of the decree, the amount expressly specified in the original decree.

On March 4, 1915, the appellee filed a petition, which subsequently on March 24, 1915, was amended, which petition, (after reciting that the bill of complaint as amended on March 22, 1915, was true), contained many representations to the effect that in the cause in which the original decree was entered there was no issue ffamed between the petitioner and appellant, or between the petitioner and one Emma Lord, who is mentioned in the original decree; that a certain judgment in favor of the appellant against the complainant, in the Municipal Court, was on July 19, 1915, opened and leave granted to the petitioner to defend; that any money demanded which appellant might have against appellee for services could only be considered in a competent legal jurisdiction upon an issue properly framed; that appellant had no right or title

attorney's fees and certain costs, and in satisfaction of a certain judgment, and further pay to appellant out of said fund, the sum of $115.35. Prior to the entry of the original decree and in that suit, there had been paid in to the clerk of the court by certain guest interpleading defendants, the sum of $2971.35. The original cause had been referred to a master in chancery, and evidence had been taken before him and a report made, and in accordance with the findings of the master a decree was framed, which was approved in writing by all the parties, or their solicitors of record in the case. The bill of review charged that the complainant was guilty of fraud in providing in the original decree that certain sums should be paid to him personally, and in obtaining from the clerk of the court, although pursuant to the actual terms of the decree, the amount expressly specified in the original decree.

On March 4, 1913, the appellee filed a petition, which subsequently on March 24, 1913, was amended, which petition, (after reciting that the bill of complaint as amended on March 22, 1913, was true), contained many representations to the effect that in the cause in which the original decree was entered there was no issue framed between the petitioner and appellant, or between the petitioner and one Emma Lord, who is mentioned in the original decree; that a certain judgment in favor of the appellant against the complainant, in the Municipal Court, was on July 17, 1913, opened and leave granted to the petitioner to defend; that any money demanded under appellant might have against appellee for services could only be certified in a competent legal jurisdiction upon an issue properly framed; that appellant had no right or title

to the $616.33. The amended petition prays that appellant be required to deposit with the clerk of the court the sum of $616.33, subject to the further order of the court.

On March 27, 1915, appellant filed certain exceptions and objections to the amended petition of the appellee, which state, among other things, that the petition does not set forth any other or different cause of action, or state any other ground for equitable relief than is set forth in the bill of complaint as amended.

On March 29, 1915, the demurrer of the appellant to the complainant's amended bill of complaint was overruled, and the exceptions and objections of the appellant to the amended petition of appellee were overruled, and the appellant given four days in which to answer the amended petition.

On April 2, 1915, the appellant filed an answer to the amended petition. In his answer he sets forth facts in justification of the charges which were made against him by appellee.

On April 12, 1915, the appellant filed, without leave, and answer to appellee's bill of complaint as amended. In that answer, the appellant, as in his answer to the amended petition, set up facts as a justification for the charges for legal services which he had made against the appellee, and also facts explanatory of the origin of the judgment in the Municipal Court.

On July 13, 1915, on motion of the appellee, an order was entered (first) striking the answer of appellant to the amended bill of complaint from the files; (second)

to the §613.33. The amended petition prays that appellant be required to depomit with the clerk of the court the sum of §312.34, subject to the further order of the court.

On March 27, 1919, appellant filed certain exceptions and objections to the amended petition of the appellee, which state, among other things, that the petition does not set forth any other or different cause of action, or state any other ground for equitable relief than is set forth in the bill or complaint as amended.

On March 29, 1919, the demurrer of the appellant to the complainant's amended bill of complaint was overruled, and the exceptions and objections of the appellant to the amended petition of appellee were overruled, and the appellant given four days in which to answer the amended petition.

On April 8, 1919, the appellant filed an answer to the amended petition. In his answer he sets forth facts in justification of the charges which were made against him by appellee.

On April 19, 1919, the appellant filed, without leave, and answer to appellee's bill of complaint as amended. In this answer, the appellant, as in his answer to the amended petition, set up facts as a justification for the charges for legal services which he had made against the appellee, and also facts explanatory of the origin of the investment in the said coal court.

On July 19, 1919, on motion of the appellee, an order was entered (first) striking the answer of appellant to the amended bill of complaint from the files; (second)

that appellant be given five days to pay to the clerk of the court $616.33, to be held by the clerk "subject to the terms of the final decree which shall be entered in this cause;" (third) "that complainant is entitled forthwith to a decree, pursuant to the prayer thereof in complainant's amended bill of complaint, but being entitled to be put in the situation in which the complainant would have been if the clerk of this court had not made the payment of said sum of $616.33 to said Lefkow, such final decree herein need not be entered, if complainant so elect, until after said Lefkow shall have complied with the order of payment by him to the clerk of this court of said $616.33, as aforesaid.

On July 16th, appellant moved the court for leave to file an amended answer to the amended bill of complaint in said cause, which was denied.

On September 23, 1915, on a petition and motion of complainant for a rule on appellant to show cause why he should not be attached for contempt for failure to comply with the order of July 13, 1915, being heard, the chancellor ordered that appellant show cause on or before October 2, 1915, why he should not be attached for contempt "for failing to pay to the clerk of this court the sum of $616.33, in obedience to the order of this court" of July 13, 1915.

On October 2, 1915, appellant filed an answer to the rule to show cause why he should not be punished for contempt of court for failure to comply with the order of July 15, 1915. In his answer, appellant purports to set forth a somewhat detailed history of his relations with his former client, the appellee. Assuming the truth of

that appellant be given five days to pay to the clerk of the court §618.32, to be held by the clerk "subject to the terms of the final decree which shall be entered in this cause;" (third) "that complainant is entitled forthwith to a decree, pursuant to the prayer thereof in complainant's amended bill of complaint, but being entitled to be put in the situation in which the complainant would have been if the clerk of this court had not made the payment of said sum of §618.32 to said Kelsey, such final decree herein need not be entered, if complainant so elect, until after said Kelsey shall have complied with the order of payment by him to the clerk of this court of said §618.32, as aforesaid.

On July 16th, appellant moved the court for leave to file an amended answer to the amended bill of complaint in said cause, which was denied.

On September 23, 1918, on a petition and motion of complainant for a rule on appellant to show cause why he should not be attached for contempt for failure to comply with the order of July 12, 1918, being heard, the chancellor ordered that appellant show cause on or before October 2, 1918, why he should not be attached for contempt for failing to pay to the clerk of this court the sum of §618.32, in obedience to the order of this court" of July 12, 1918.

On October 2, 1918, appellant filed an answer to the rule to show cause why he should not be punished for contempt of court for failure to comply with the order of July 16, 1918. In his answer, appellant purports to set forth a somewhat detailed history of his relations with his former client, the appellee. Assuming the truth of

the answer, it cannot be said without further evidence that the matters complained of in the original decree were anything more than irregular. The legal services rendered by appellant for appellee up to the time of the entry of the original decree, if as set forth in the answer, were fairly and reasonably worth much more than the whole of the amount due appellee in the original cause.

On October 11, 1915, the court entered an order substantially as follows:

1st: That appellant "through an illegal and void, and in effect fraudulent decree, and in disregard of his professional obligation to complainant herein as his client, and in violation of his official duty as an attorney and counselor at law of this court, heretofore obtained from the hands of the clerk of this court and from the custody of the law, the sum of $616.33, as averred in the amended bill of complaint herein and in the amended petition of complainant, which was filed in this cause" on March 24, 1915.

2nd: That having failed to comply with the order of July 13, 1915, appellant has been guilty of a contempt of court and stands committed to the County Jail until he shall comply with the order of July 13, 1915, or be otherwise discharged from imprisonment.

Inasmuch as the contempt was based on a violation of the order of July 13, 1915, it becomes necessary to determine whether that order was legally authorized. If the original decree was a consent decree, then it would follow that the bill of review for errors of law

the answer. It cannot be said without further evidence that the matters complained of in the original decree were anything more than irregular. The legal services rendered by appellant for appellee up to the time of the entry of the original decree, if he set forth in his answer, were fairly and reasonably worth much more than the whole of the amount due appellee in the original cause.

On October 17, 1918, the court entered an order substantially as follows:

Def: That appellant "through an illegal and void, and in effect fraudulent decree, and in disregard of his professional obligation to complainant herein as his client, and in violation of his official duty as an attorney and counselor at law of this court, heretofore obtained from the hands of the clerk of this court from the custody and of the law, the sum of $2616.32, as stated in the amended bill of complaint herein and in the amended petition of complainant, which was filed in this cause" on March 24, 1918.

And: That having failed to comply with the order of July 13, 1918, appellant has been guilty of a contempt of court and stands committed to the County Jail until he shall comply with the order of July 13, 1918, or be otherwise discharged from imprisonment.

Inasmuch as the contempt was based on a violation of the order of July 13, 1918, it becomes necessary to determine whether that order was legally authorized. If the original decree was a consent decree, then it would follow that the bill of review for errors of law

apparent on the face of the decree would not lie. The history of the proceedings in the original cause as it appears in this record, showing as it does, among other things, the examination and approval of the decree by the master in chancery and the "O.K." by the solicitors for the parties of record, compel the conclusion that the original decree was a consent decree. In Krieger v. Krieger, 221 Ill. 479, the court said: "The decree should show upon its face that it was entered by consent. * * * But in Armstrong v. Cooper, supra, it was held that such a showing is not indispensable and that the agreement can be shown by other evidence which does not contradict the record, but is consistent with it."

It is stated by the appellee that "it would be a good plea to a bill of review that the decree in the original cause was entered by consent; but such a defense must be pleaded or insisted on in the answer." However, in a contempt proceeding where the conduct of a solicitor of record is in question, the chancellor has authority to consider the whole record as it appears before him. Holding, therefore, that the original decree was by consent, did the lower court have jurisdiction of the bill of review? In Krieger v. Krieger, supra, the court said: "Such a decree is not in a strict legal sense a judicial sentence, but it is in the nature of a solemn contract." A consent decree, especially in such a case as this, where there is a fund to be distributed and many parties, is frequently a compromise that sometimes includes and involves matters dehors the record, and which are not entirely consistent with the technical issues

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precipitated by the pleadings. In Armstrong, et al v. Cooper, 11 Ill. 540, Mr. Justice Caton said: "A decree made by consent cannot be appealed from, nor can error be properly assigned upon it. Even a rehearing cannot be allowed in the suit; nor can the decree be set aside by bill of review," and in Bradish v. Gee, 1 Ambler's Chan. Rep. 229, the chancellor said, suggesting a remedy: "Where a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really give his assent; but his remedy is against his counsel."

In the instant case, therefore, if the bill of review only charged errors of law apparent on the face of the original decree, it was not error to overrule appellant's demurrer. Further, if the bill of review sufficiently charged fraud, certainly the appellant's answer should not have been stricken and the appellant denied a hearing. We believe it to be the law, also, that even if the court took jurisdiction of the bill of review and of the answer, the chancellor would be entitled only to revise the terms of the original decree, and would not have authority to order appellant to pay money to a third person, e.g. the clerk of the court. We are of the opinion, therefore, that the entry of the order of July 13, 1915, was error.

It may be that if an appropriate issue were formed and a trial in a proper forum had, that the evidence will show that appellant was equitably entitled to the money he received from the clerk of the court, although that part of the decree which provided for it

precipitated by the pleadings. In Turpin, et al v. Sortor, 71 Ill. 240, Mr. Justice Lawton said: "A decree made by consent cannot be appealed from, nor can error be properly assigned upon it. Even a recording cannot be allowed in the suit; nor can the decree be set aside by bill of review," and in Trudick v. Sec. I Andler's Chan. Rep. 138, the chancellor said, entertaining a remedy: "Where a decree is made by consent of counsel, there lies not an appeal or rehearing, though the party did not really give his consent; but his remedy is against his counsel."

In the instant case, therefore, if the bill of review only charged errors of law apparent on the face of the original decree, it was not error to overrule appellant's demurrer. Further, if the bill of review sufficiently charged fraud, certainly the appellant's answer should not have been stricken and the appellant denied a hearing. We believe it to be the law, also, that even if the court took jurisdiction of the bill of review and of the answer, the chancellor would be entitled only to revise the terms of the original decree, and would not have authority to order appellant to pay money to a third person, e.g. the clerk of the court. We are of the opinion, therefore, that the entry of the order of July 13, 1915, was error.

It may be that if an appropriate issue were framed and a trial in a proper forum had, that the evidence will show that appellant was equitably entitled to the money in question from the clerk of the court, although that part of the decree which purported to

payment, was, considering the issue in that case, irregular and error. Under such circumstances the conduct of the appellant might be shown to be entirely innocent. If, however, in such a case it were shown that appellant as solicitor brought about the irregularity in order that he might personally profit by obtaining money from the clerk of the court to which he was in no way entitled, then his conduct would justify condemnation and punishment.

Upon a careful scrutiny of the record in this case, and assuming the truth of the facts set forth in appellant's answers to the bill of review and petition, neither of which was entertained by the court, it would seem that upon a trial the equities may be entirely with appellant; that, although, technically considered, some of the provisions of the original decree were irregular, having in mind the exact issues of the case, the charges made by appellant for legal services rendered his client, for the payment of which the money was appropriated, (and which constitute the practical basis of this litigation) were generously low.

We are, therefore of the opinion that the order of the lower court in adjudging appellant guilty of a contempt of court, is erroneous and should be reversed.

REVERSED.

(OVER)

Upon a careful scrutiny of the record in this case, and assuming the truth of the facts set forth in appellant's answers to the bill of review and petition, neither of which was controverted by the court, it would seem that upon a trial the petition may be entirely with merit; that, although, technically considered, none of the provisions of the original decree were irregular, having in mind the exact issues of the case, the decree made by appellant for legal services rendered his client, for the payment of which the money was appropriated, (and which constitute the greatest waste of this litigation) were immeasurably low.

We are, therefore of the opinion that the order of the lower court in refusing appellant's petition should be reversed.

(OMIT)

MR. PRESIDING JUSTICE O'CONNOR specially concurring:

I agree with the conclusion reached, but not in all that is said in the opinion. In my opinion the decree entered in the original case was not a consent decree merely because it was O.K.'d by the solicitors. Such a decree may or may not be a consent decree, depending upon the circumstances. In the original case evidence was introduced before the master, who made up his report. Counsel for defendants in that case were satisfied with the decree, so far as it affected them and are not complaining, but there was certainly no consent so far as appellant and his client were concerned. Furthermore, on the hearing before the chancellor, appellant did not in any manner contend that the decree in the original case was entered by consent, and it is elementary that such contention cannot be urged for the first time in an appellate tribunal. I am of the opinion, however, that the order of commitment should not have been entered before the original decree was corrected, nor without appellant's having an opportunity to be heard in support of his answer.

MR. JUSTICE MACKINNON especially concurring:

I agree with the conclusion reached, but not in all that is said in the opinion. In my opinion the decree entered in the original case was not a consent decree merely because it was C.K.'d by the solicitors. Such a decree may or may not be a consent decree, depending upon the circumstances. In the original case evidence was introduced before the master, who made up his report. Counsel for defendants in that case were satisfied with the decree, so far as it affected them and are not complaining, but there was certainly no consent so far as appellant and his client were concerned. Furthermore, on the hearing before the chancellor, appellant did not in any manner contend that the decree in the original case was entered by consent, and it is elementary that such contention cannot be urged for the first time in an appellate tribunal. I am of the opinion, however, that the order of commitment should not have been entered before the original decree was corrected, nor without appellant's having an opportunity to be heard in support of his answer.

394 - 22349

ROBERT H. INGERSOLL et al.,
Appellees,

vs.

JOSEPH BROWN & COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 537

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action in trover. The declaration contains two counts, one in the conventional form, and the other varying therefrom in adding to the averment respecting the defendant's knowledge that the property was plaintiffs', that defendant "contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiffs, hath not yet delivered" etc.

The proof adduced was to the effect that defendant owed plaintiffs a balance of $171.40 on a bill for goods previously shipped and sent one of its employes to defendant's place of business who told some one there giving directions about its business that plaintiff would not ship the goods in question, which defendant had ordered, until that bill was paid, that thereupon the party addressed said he would send the check that night, that the check was not sent, that the goods were afterwards (either that day or the next) sent and delivered, and that the next day an involuntary petition in bankruptcy was filed against defendant.

There was no proof of a demand and refusal, as averred in the declaration, plaintiff relying wholly on

such a state of facts as constituting fraudulent and wrongful possession, because, as claimed, defendant obtained the goods without intending to fulfill its promise to pay for them.

At the close of plaintiffs' evidence defendant moved for an instructed verdict. It is clear upon such a state of facts the motion should have been granted, for the evidence did not tend to show that defendant did not obtain possession of the goods lawfully. The only basis for the contention that the defendant obtained them unlawfully is that it did not intend to fulfill its promise and therefore fraudulently induced a delivery of the goods. It is too well settled for citation of authorities that the making of a promise with an intent at the time of not performing does not constitute a fraud and is not actionable (Grubb v. Milan, 249 Ill. 456); and if delivery was intended to be conditional upon the payment of said bill then no right of action accrued without notice by plaintiffs of their election to rescind the contract and a demand for the return of the goods. In either aspect of the case a demand was necessary to the maintenance of the suit. None was made. Nor does such a state of facts show a general or special property right to the goods in plaintiffs or right to their possession. Hence the motion should have been allowed.

The situation was not changed by introducing evidence in defense to the effect that the only person authorized to sign a check for the defendant had no knowledge of any request for the payment of said bill, after which defendant again moved for an instructed verdict in its behalf. The motion should then have been allowed, as there could be no recovery at law in an action of trover in such circumstances. But

on another trial plaintiff may be able to show a conditional delivery. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

341 - 22775

JOHN J. GORMLEY,
Appellee,

vs.

ANNA VYDARENA, PAUL VYDARENA, and RUDOLPH LEDERER and SAMUEL LEDERER, trading as Lederer Bros., (Defendants)

RUDOLPH LEDERER and SAMUEL LEDERER,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

205 I.A. 538

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On August 10, 1914, the complainant, John J. Gormley, filed his bill of complaint in the Superior Court of Cook County, in which he alleged that he had, on July 31, 1914, recovered a judgment against the defendant Anna Vydarena for $5,050; that on August 5, 1914, an execution was issued on said judgment, which was returned August 8, 1914, "no part satisfied"; that the defendant Anna Vydarena was at the time this judgment was entered the owner of a master's certificate of purchase for real estate in Chicago, known as 870 Elston avenue; that for the purpose of defrauding the complainant, she had made a pretended assignment of this certificate to the defendants Rudolph Lederer and Samuel Lederer, trading as Lederer Bros.; that this assignment was without consideration and was made with the intention of defrauding the complainant and other creditors; that while title to the certificate in question is in Rudolph Lederer and Samuel Lederer, Anna Vydarena is the owner thereof and all interest therein, and that the certificate in question was assigned to the Lederers with the view of protecting the property of Anna Vydarena from the lien of the judgment

[redacted]

[redacted]

[redacted]

in favor of the complainant. The bill prays that the defendants Anna Vydareha, Paul Vydarena, Rudolph Lederer and Samuel Lederer be decreed to pay the amount due the complainant, and to apply any property, real or personal, belonging to Anna Vydarena or held in trust for her, to the payment and satisfaction of the said judgment.

Answer under oath was not waived in the bill, and a sworn answer was filed by the defendants in which they admitted the entry of the judgment; they denied, however, that Anna Vydarena was the owner of the master's certificate in question; that the assignment to the Lederers was without consideration and that it was made with the purpose of defrauding the complainant.

It is also set up in the answer filed by the Lederers, defendants, that the master's certificate in question was purchased by Anna Vydarena on behalf of her husband, Paul Vydarena, for the sum of $4,450; that title to the certificate was by mistake taken in the name of Anna Vydarena; that Paul Vydarena had advanced towards payment therefor $460, and that on June 28, 1914, the defendants Rudolph and Samuel Lederer, as Lederer Bros., loaned to Paul Vydarena the balance of the purchase money of the certificate, $3,990, and $50 for the continuation and examination of the abstract; that thereafter the certificate was assigned to the defendants Rudolph and Samuel Lederer, as Lederer Bros., to secure them for their loan to Paul Vydarena of the aforementioned sum of $4,040. It is also alleged in the answer that in addition to the above, the defendants Lederer Bros. advanced to Paul Vydarena the sum of $600, which was used for the purpose of obtaining quit-claim deeds from Christine Kroghand Anker W.

Jacobson to the real estate described in said master's certificate. The defendants in their answer deny that the certificate was transferred to them for the purpose of defrauding the complainant, and that they hold the same in trust for the defendant Anna Vydarena or that she is in any way beneficially interested therein.

The cause was referred to a master who, in his report, finds in favor of the material allegations of the bill of complaint, that the defendant Anna Vydarena and her husband, Paul Vydarena, had by fraud procured the sum of $5,100 from the complainant, and that the defendants Rudolph Lederer and Samuel Lederer, with knowledge of the fraudulent conduct of the other defendants, had procured an assignment of the certificate in question for the purpose of preventing the complainant from satisfying his judgment or any part thereof out of said certificate.

Objections were filed and on being overruled were allowed by order to stand as exceptions to the master's report; the exceptions were overruled, the master's report was confirmed, and a decree was entered which ordered that the defendants pay to the complainant the sum of $5,013 with interest thereon at 5% per annum from July 31, 1914, to date of payment, less a credit of $26; and also to pay complainant his necessary legal costs, expenses and master's fees. It was further ordered and directed by the decree that in case the defendants failed to pay the above sum within ten days after the entry of the decree, the defendant Samuel Lederer, to whom the master's certificate in question had been assigned, should surrender and deliver the same to

Joseph F. Mahoney, one of the masters in chancery of the Superior court, and transfer to said master all title, right and interest which the defendant Samuel Lederer had or claimed in and to the certificate; and it was further ordered by the decree that the master, after receipt of said certificate from Samuel Lederer, should sell the same at public auction and turn over to the complainant any sums realized from such sale, less the necessary legal expenses, etc.

The defendants Rudolph Lederer and Samuel Lederer seek by appeal a reversal of this decree.

The evidence heard by the master discloses that complainant, John J. Cormley, was a workman employed in a tannery in Chicago. On May 1st, 1914, he had on deposit in various banks in the city of Chicago a considerable sum of money; on the 2nd day of May, 1914, he visited the saloon conducted by the defendant Paul Vydarena. Prior to this time he had had some acquaintance with Vydarena and his wife, the defendant Anna Vydarena, who knew that complainant was possessed of the money which he had on deposit in the banks. On the last mentioned date Paul Vydarena informed the complainant that certain real estate, known as 870 Elston avenue, Chicago, was to be sold as a result of certain court proceedings, and he requested the complainant to loan him $5,000, saying to complainant at the time that he, Vydarena, could make at least $1,000 on the purchase. The evidence satisfactorily shows that at this time and for some weeks thereafter the complainant remained about the saloon, staying at night in the rooms of the Vydarenas, defendants, just over the saloon. During most of this time the complainant was intoxicated through the use of liquor supplied him by the Vydarenas. On the 7th day of May, 1914, complainant agreed to loan Paul Vydarena the $5,000

with which to purchase the property in question, and on that day the complainant, accompanied by Anna Vydarena, visited the six banks in Chicago in which complainant had money deposited, and drew therefrom in all the sum of $5,100, which when drawn was placed in a hand-bag that was carried by Anna Vydarena. After withdrawing this money from the banks the complainant and Anna Vydarena returned to the saloon of Paul Vydarena, and there, in the presence of complainant, Mrs. Vydarena turned the money over to her husband. The money consisted of $4,100 in currency and a cashier's check for $1,000. The $1,000 check was on the 15th day of May, 1914, deposited in the Security Bank of Chicago, in which Paul Vydarena had an account of $130 at the time. This check was paid through the Clearing House. Following the delivery of the money on May 7, 1914, to the defendant Paul Vydarena, the complainant remained at the Vydarenas' flat until the 14th day of June, 1914.

Complainant had made repeated demands for some security for his money, and it appears that the defendant Anna Vydarena came into his room one day while he was in bed, and said, "here is the paper you were talking to Paul about," and she placed the paper in the pocket of complainant's clothing. The next morning complainant looked at the paper for the first time, and discovered that it was a note for $5,100, which was signed by Anna Vydarena only.

On the 14th day of June, 1914, the complainant became ill because of excessive drinking, and went to a hospital where he remained two weeks; he then returned to the Vydarenas and remained there until July 1, 1914, when he again went to the hospital for two weeks; thereafter he returned to the Vydarenas and remained with them until July

28th, when for a third time he went to the hospital, where he remained for about two weeks.

On different dates after May 7, 1914, the Vydarenas paid complainant sums aggregating $126. On June 19, 1914, the real estate at 870 Nielsen avenue was sold at a judicial sale under a decree of court, for $4,450, and the property was bid in by an attorney, S. B. Freud, who directed the master to make the certificate of sale to Anna Vydarena, defendant. Freud then deposited the sum of $460 with the master. Anna Vydarena was present at the sale, but her husband was not.

On the 29th day of June Anna Vydarena assigned the certificate of sale to the defendant Samuel Lederer, and on the 30th day of June the defendant Paul Vydarena by written assignment conveyed all his interest in the certificate to Lederer, and it was then delivered to Lederer by his attorney, Freud.

The evidence discloses that Freud is a brother-in-law of the defendants Samuel Lederer and Rudolph Lederer; that he is and for a considerable time has been their confidential adviser and attorney, and that he acted in the transaction in question as attorney for both the Lederers and the Vydarenas. The Lederers were doing a wholesale liquor business at the time, under the name of Lederer Bros., and the Vydarenas had for about three months been a customer of the firm. The Vydarenas were at the time in question possessed of very little means or property of any kind, excepting the saloon operated by Paul Vydarena, the only other property or means which they possessed, so far as shown, being a balance in the bank account of Paul Vydarena in the Security Bank, which at no time between January 19, 1914, and December 7, 1914, exceeded the sum of $140, excepting the credit given

him for the deposit of the $1,000 cashier's check which had been delivered to him by complainant. On the 19th day of June, 1914, before the sale of the Elston avenue property, Paul Vydarena drew a check on this account for the sum of $1,000. This check was cashed by Freud with money taken by Freud from the safe of Lederer Bros., to which Freud had access. Vydarena gave $500 of this sum to his wife to enable her to make a deposit at the time the property was bid in for her by Freud at the master's sale.

It was insisted at the hearing by the defendant Anna Vydarena that the $5,100 was given to her by complainant as a present, and that she lost the whole amount while on a trip to Michigan during July. There is much evidence in the record touching this question, but the whole story of the loss of the money is so unbelievable and unlikely that we are not inclined to encumber this opinion by reference to it; and, indeed, we have no hesitation at all in saying, from the evidence heard by the master, that both the Vydarenas, deliberately and by the use of fraud of the grossest sort, obtained possession of complainant's money.

It is contended on behalf of the Lederers that whatever fraud in fact was committed by the defendants Vydarena, they, the Lederers, were not parties thereto and that they were in no sense responsible therefor; that the partnership Lederer Bros. did not in fact advance the money to the Vydarenas, but that the loan was made by Samual Lederer on his individual account, and that the certificate of sale of the property in question was duly transferred to him for the purpose of securing the payment of the money which he claims he had advanced to Paul Vydarena. Lederer Bros. were experienced business men, and there is an abundance of evidence in the record which indicates that they would not and did

not loan the large sum of money, $5,240, which it is asserted they advanced to Paul Vydarena, under the circumstances which attended the transactions in question, and in view of their, the Lederers', knowledge of the financial condition of the Vydarenas.

Rudolph Lederer, who asserts that he had no interest in the transaction in question, testified that he gave $4040 to Paul Vydarena to purchase the certificate, between the first and the 15th day of July, 1914, and that at this time he had made no examination whatsoever of the property described in the certificate which he was to receive as security for the loan; that subsequently, about two weeks after the first loan was made, Lederer Bros. or Samuel Lederer made another loan of $1,200 to Paul Vydarena, with which to purchase certain quit-claim deeds from certain heirs who claimed an interest in the property, and that Lederer Bros. had to borrow the money to make this second loan.

It appears that at the time these alleged loans were made to Paul Vydarena, who seems to have been both morally and financially irresponsible, the Lederers took no security at all; no note was delivered to them, and from the evidence it is derived that they were relying altogether upon Vydarena's promise to transfer or assign the certificate of sale. Rudolph Lederer does testify that Freud, his brother-in-law and confidential adviser and attorney, did look at the property in question before the loans were made, and that he told the witness that the property was worth $6,000. If it be conceded that Rudolph Lederer conveyed to Samuel Lederer the information, given to him by Freud, that the property was worth $6,000, then it appears

that this experienced business man loaned $5,240 on the security of a certificate of sale of property which he had not examined. When on the witness stand, the defendant Samuel Lederer seemed to be unable to give much definite information about anything connected with the transaction; he was unable to tell the date when the money was loaned; he was not present when the property was bid in by Freud for Anna Vydarena; he knew nothing about the date of the sale, and he testified that he had no record, book account or other memoranda evidencing that he had ever made the loans, to whom the loans were made, the terms upon which they were made, or the purpose of making them, although he admitted that at the time in question, that is when these loans were made, the other defendants, Paul Vydarena and his wife, Anna, were indebted to Lederer Bros. to the extent of between $400 and $600.

As indicated, the evidence relating to these transactions is very voluminous. We are convinced, however, from an examination of it that a gross fraud was perpetrated upon the complainant, Cormley, and that the Lederer brothers never did make the loan which they assert they made to Vydarena for the purpose of enabling the Vydarenas to get possession of the certificate of sale in question. It is true, as asserted, that no witness who testified in the case positively states that the Lederers knew of the transactions between Cormley and the Vydarenas; yet we are convinced from the whole evidence that neither Lederer Bros. nor Samuel Lederer individually did advance $5,240 to Paul Vydarena as alleged, and we think it apparent from the whole record that the money of the complainant was in fact used by the defendants Vydarena to procure the certificate of sale - and this,

even though it be conceded that the master who delivered the certificate did receive in payment therefor the check of Lederer Bros. as testified to by Rudolph Lederer and Freud. Freud is an attorney at law; he seemed to be the active agent in the whole transaction, and it is hardly probable that he would have permitted his clients and relatives to make the investment which he asserted they did make when they made the alleged advances to Paul Vydarena. No security at all was given at the time the loans were made, and even the security of the certificate of sale, if we accept all of the testimony of defendants as true, would have rendered the transaction a precarious one for the defendant Samuel Lederer. Freud seemed to be the one who manipulated the deal; he was attorney for all of the defendants; so intimate were his relations with the Lederers that he had access to their safe, and he cashed the check for $1,000 signed by Paul Vydarena, which the evidence satisfactorily shows was drawn against the check for $1,000 deposited by Vydarena in his bank account on May 15, 1914. The evidence heard upon the hearing justified the master in his conclusion that the assignment of the certificate by Anna Vydarena to the defendant Samuel Lederer was done for the purpose of defrauding her creditors, and particularly the complainant. Anna Vydarena asserts that the certificate was taken in her name by mistake. We have no more confidence in this testimony than we have in almost all that she related in connection with the entire transaction. It is evident that the attorney, Freud, knew what he was doing when he had the certificate issued to Anna Vydarena; the assertion made that this was the result of error and that the certificate should have been issued to Paul Vydarena, is evidence of the knowledge that Freud

possessed, - that the conduct of the defendant Samuel Lederer and his brother Rudolph would appear more reasonable if the Lederers were to assert that they were dealing with Paul and not Anna Vydarena.

In the latter part of July or the early part of August, 1914, the complainant, accompanied by his attorney, a Mr. Dow, called upon Freud and asked him for some explanation as to the Lederers' claim upon the certificate which had been transferred to Samuel Lederer. Complainant testified that Freud in the course of this conversation said that the Lederer Bros.' claim consisted of only $1,200 which the Lederers had loaned to the Vydarenas to purchase certain outstanding claims against the property. Mr. Dow testified that he remembered that in this conversation Freud said that the claim of the Lederers on the property was for $600 or $700. We have examined the testimony of Freud, and we are inclined to believe that he was far from frank with complainant, and that the version of this conversation as given by complainant may be accepted as true. From the whole record we think it clear that the claim of an indebtedness of $4,040 was the result of a fraudulent agreement among the defendants - entered into after the conversation just referred to.

In the bill of complaint answer under oath was not waived, and it is asserted, in that the answer of the defendants Lederer was sworn to, the allegations of such answer were not overcome by two witnesses, or the equivalent thereof, in accordance with the statute.

The bill alleges and the master found in his report that Anna Vydarena was the owner of the master's certificate and that she assigned it to Samuel Lederer without consideration for the purpose of defeating the complain-

ant and other creditors. No objection was made or exception taken to the finding of the master as to this allegation. The theory of the defendant Samuel Lederer is that he derived title from the defendant Paul Vydarena; he makes no objection to the finding that Anna Vydarena was the owner of the certificate and that she assigned the same to him without consideration. The evidence supports the finding of the master. The allegation of the answer that Paul Vydarena was the owner of the certificate in question is a pleading of new matter; it does not attempt or pretend to answer any allegations of the bill, and hence the burden of proof of this new matter rested upon the defendants. We think that those allegations of the answer which directly met the allegations of the bill have been overcome by the testimony of two witnesses or the equivalent thereof. There is inherent improbability in the allegations of the whole answer.

The claim that the master erred in admitting testimony can avail the defendants nothing in this court; they have failed to point out any specific ruling on the admission of such testimony which constituted error; and also the abstract of record does not disclose that any testimony was objected to at the time it was received by the master.

The form of the decree was proper; it provided, in the alternative, that Samuel Lederer should deliver up the certificate in question to the master or, failing to do so, a money decree was to be entered against him for the amount which the master found due to the complainant. We see no objection to the form of this decree.

We are inclined to agree with counsel for complainant that by failing to make objection and note exceptions at the proper time during the course of the proceedings, the

defendants have waived their right to present the merits of the controversy in this court. We have, however, examined the entire record, and are convinced therefrom that the decree of the Superior Court is correct; it is therefore affirmed.

AFFIRMED.

344 - 22778

THE BUTCHERS' ADVOCATE CO.,
a corporation,
Appellee,

vs.

AUTOVACUUM REFRIGERATING CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 540

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against the defendant on a contract for advertising inserted in the Butchers' Advocate, a weekly paper published by plaintiff. The contract under which suit was brought is as follows:

"Chicago, Dec. 21, 1914.

The undersigned hereby authorize the Publisher of The Butchers' Advocate to insert our advertisement to occupy 5 inches every other week in The Butchers' Advocate, for three months and thereafter until the publisher has order to discontinue the advertisement for which we agree to pay $6.00 (six dollars) per insertion.

AUTOVACUUM REFRIGERATING COMPANY
Per W. J. Kelly.

All conditions are mentioned in this contract. If copy for advertisement is not received the publisher is hereby authorized to supply same."

The defendant seeks here a reversal of a judgment in favor of the plaintiff in the sum of $84.

We are asked to review the action of the trial court in but one particular. It is asserted that on January 11, 1915, the defendant mailed to the plaintiff a letter in which defendant stated in substance that it was not then ready to deliver to plaintiff certain electrotype cuts for the advertisement in plaintiff's paper. It is also insisted that on February 3, 1915, the defendant notified plaintiff by letter that it had decided not to do any advertising just then,

and that it would not send on the cuts referred to. Carbon copies of the letters were offered in evidence, and on objection were ruled out by the trial court.

No notice was given to plaintiff or its counsel of the intention to introduce secondary evidence of the contents of the letters, and no demand was made upon them to produce the same in court. Plaintiff contends that it knew nothing of the letters in question - that it had never received them - although there was proof that the letters had been regularly mailed to it; and it is not at all clear from the testimony of the president of the plaintiff, and also of its manager, that the letters had not been received at the office of the plaintiff.

In C. C. C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 645, relied upon by plaintiff, it appeared that a certain letter which the appellant's attorneys were requested to produce at once, was not in their possession and that they were unable to say at the time the demand for its production was made whether they could produce it or not; and it was held that under such circumstances notice should have been served a sufficient length of time before the trial to enable the appellant to produce the letter.

We think the copies of the letters in question should have been admitted in evidence; it was shown that they were regularly mailed to the plaintiff, and this gave rise to a presumption that they had been received by it. While there is some doubt in the testimony of plaintiff's witnesses whether the letters were received, it is clear, according to plaintiff's witnesses, that the letters were not in the possession

of plaintiff at the time of the trial, and it would have been futile to serve notice for their production in court.

The letters were not part of the contract sued upon. The contract was specific, and the defendant was bound to comply with its terms and provisions. The defendant had no legal right to abrogate the contract, and even if it be conceded that it had in fact attempted to do so, such attempt could not in any manner affect the right of the plaintiff to bring its action thereon. Under the circumstances of the case the plaintiff's right to perform the contract and to demand the sum for such performance which the defendant had agreed to pay cannot be questioned.

We think it clear, however, that the plaintiff should not be permitted to recover an amount in excess of $36. The contract by its express terms provided that the advertising was to be inserted for a period of "three months and thereafter until the publisher has order[illegible] to discontinue the advertisement." We think, on the record made in the trial court, the correspondence between the parties, the circumstances under which and the time when the plaintiff inserted the advertisement in question, that it had ample notice and warning that the defendant did not intend to be bound by the contract beyond the three months' period therein fixed.

The judgment of the Municipal Court will be reversed and judgment will be entered here in favor of the plaintiff for the sum of $36, costs in this court to be taxed against the plaintiff.

REVERSED AND JUDGMENT HERE.

347 - 22781

EMMA K. BLANKS,
Appellee,

vs.

W. H. MILLS, DAN MACKNETT and FRANK C. FINNBACK,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 542

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County in favor of the plaintiff and against the defendants for the sum of $420. A narr. and cognovit were filed in the case November 10, 1915; the narr., consisting of only one count, declared on a lease which had been entered into between the parties; judgment by confession was entered on the day following. On February 26, 1916, the defendants appeared and entered their motion, supported by affidavit, that the judgment be vacated and opened up, and that they be allowed to plead to and defend the action. The affidavit upon which the defendants relied in support of their motion set up that the lease sued on was canceled and terminated by the parties thereto on or about September 20, 1915, and that the plaintiff had failed and refused to re-rent the premises described in the lease, although numerous opportunities for so doing had been offered to plaintiff. The motion to vacate was denied, and the defendants are seeking here to reverse this action of the court.

But one question is presented for the consideration of this court, and that is, whether the affidavit sufficiently showed that the defendants had a good and meritorious defense to the action brought against them. In the affidavit it is set

up that the lease in question had been canceled and terminated; no facts are alleged in support of this conclusion. We are not placed in possession of the acts or facts from which the defendant who swore to the affidavit was authorized to conclude that the lease had been terminated. Had the facts or acts upon which the affiant had relied been before the trial court, that court could have determined whether or not there had been a cancellation or termination of the lease; and so also with reference to the averment "that the plaintiff has failed and refused to re-rent the said premises covered by said lease, although numerous opportunities for so doing have been offered the plaintiff." This statement consists of conclusions only; if the defendants relied upon the failure of the plaintiff to re-rent the premises, and that she had refused to take advantage of opportunities to do so, they should have stated the facts which led to such conclusions. Had such facts been placed before the court it might have concluded that they did not amount to a refusal or a failure on the part of plaintiff to use reasonable efforts to re-rent the premises in question.

An affidavit in support of a motion to vacate a judgment is to be construed strictly against the party presenting such affidavit. An order to vacate a judgment regularly entered in a cause, will not be entered unless upon a statement of the facts relied on for the entry of such order of vacation; conclusions of the pleader are not sufficient. Chicago Fire Proof Co. et al. v. Park National Bank, 145 Ill. 481; Eggleston v. Royal Trust Co., 205 Ill. 178; Culver v. Brinkerhoff, 180 Ill. 533.

In Sears v. Curtis, 189 Ill. App. 420, relied upon by the defendants, the court in its opinion stated that

"this affiant stated facts which tended to show that after the Curtis Company had abandoned the premises the plaintiff made no efforts to re-rent the same to other parties and thereby lessen the damages." It was held in that case that it was the duty of the plaintiff to exercise diligence in re-renting the premises, and that under the showing made the court should have opened the judgment. The affidavit in support of the motion in the Sears case supra set up as a fact that the plaintiff had stated that he had refused to show certain rooms to prospective tenants while other parts of the same premises were vacant. The affidavit which the defendants in the case at bar rely upon does not unequivocally state facts from which the trial court would be authorized to indulge the belief that the defendants had a good and meritorious defense to the action brought by the plaintiff.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

353 - 22787

NELLIE CARLIN, Admx. Estate of Max Glick, deceased,
Appellee,

vs.

PEERLESS GAS LIGHT COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 543

MR. JUSTICE DEVEN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County in favor of the plaintiff and against the defendant for the sum of $5,000.

The declaration filed by plaintiff originally consisted of three counts; the first and third were dismissed out of the case. The second count alleges in substance that the defendant, Peerless Gas Light Company, a corporation, on April 9, 1903, was engaged in the business of manufacturing burners, mantles, etc.; that in the doing of such business it occupied and used a certain floor or floors of a building in the City of Chicago; that the defendants Ida Hambrock and Adele T. Bassett on said date owned and managed said building; that the building contained a certain elevator shaft, running through and past the different floors of the building; that at the time aforesaid plaintiff's intestate was employed by the defendant corporation, and that it thereupon became and was the duty of such defendant to provide plaintiff's intestate, Max Glick, with a reasonably safe place in which to work; that it was the duty of the other said defendants to keep and maintain the elevator shaft in question in a reasonably safe condition, so that persons rightfully in and upon the premises would not be injured.

It was further averred that the defendant corporation in disregard of its duty allowed and permitted a certain

large number of boxes, bales or barrels to be piled up in its plant or factory, "so that by reason thereof they became and were dangerous and unsafe"; that the other defendants, owners of the building, negligently permitted the elevator shaft to be unprotected and unguarded at or near the floor of said building occupied by the defendant corporation, and in proximity to which the said barrels, bales or boxes were so piled; that while plaintiff's intestate was at work for the defendant corporation at the place aforesaid, and in the exercise of due care for his own safety, the said pile of boxes, barrels or bales was caused to and did totter, and some of the said boxes, barrels or bales by reason thereof were caused to and did fall upon plaintiff's intestate while he, in the exercise of due care, was in the act of getting "out of the way of said barrels, boxes or bales, as aforesaid, when he was caused to and did fall down and through said elevator shaft or hoistway to and upon the ground or basement floor, and which said fall was caused by the joint and concurrent negligence of the said defendants"; that by reason of such fall plaintiff's intestate was killed, etc.//

The defendant Peerless Gas Light Company filed three pleas to the declaration - (1) the general issue, (2) that there is not and was not at the time of the commencement of the suit any such corporation as the Peerless Gas Light Company, and (3) that the suit had not been brought by the plaintiff within a year after the death of plaintiff's intestate. A demurrer was sustained to the third plea, and the defendant elected to stand by such plea. The declaration was subsequently amended by striking out the words "joint and concurrent" in the second count, and an order was entered that the defendant's pleas stand as pleas to the declaration

as amended, "and that all papers and proceedings be amended by dismissing as to Ida Hambrook and Adele T. Bennett."

The evidence heard on the trial tended to prove that the deceased at the time of the occurrence in question was 18 years old; that he had been employed by the defendant in the building occupied in part by it for a period of four years; that the defendant was organized as a corporation in February, 1900; that its charter was canceled February 1, 1902, for failure to make the annual report required by statute; that in December, 1903, a new company, known as the Peerless Light Company, was organized, and that it took over the business of the Peerless Gas Light Company. The accident occurred on the 9th day of April, 1903, that is, about eight months before the new corporation was organized.

The point is made by counsel for the defendant that the declaration states no cause of action. The declaration states that plaintiff's intestate at the time the accident occurred "was at work for the defendant at the place aforesaid." It is quite true, as urged, that an employer is under no obligation to a servant to keep in a safe condition that part of his premises where the duties of the servant do not require his presence. The declaration directly charges that the deceased was and for four years had been employed by the defendant "at the place aforesaid." In the paragraphs of the declaration just preceding the paragraph in which the words quoted appear, it is charged that the owners of the building had negligently left the elevator shaft unguarded at the floor occupied by the defendant, and that the defendant had negligently piled near such unguarded elevator shaft certain boxes, barrels, etc. The charge in the declaration, as we construe it, is that the deceased was employed by the defendant and that he was

working for the defendant at the place referred to in these paragraphs, that is, at the place where the boxes and barrels were piled, near the unguarded opening in the elevator shaft. While the declaration is not free from defects and inaccuracies, it sufficiently sets forth that the accident which caused the death of deceased occurred at a place where the deceased was, in the course of his employment, at work for the defendant.

The building where the accident occurred was four stories high; the defendant occupied all of its third and fourth floors, and also a part of the first and second floors. At the rear of the building an elevator shaft extended from the basement to the fourth floor; doors opened from this shaft in such manner and at such places that the elevator which was operated in it served the defendant as well as other tenants in the building; these doors opened out into the rooms, from the north and south sides of the shaft. The accident happened on the third floor. This floor was divided into a front and back room, which rooms were divided by a partition, with a door opening therein. The rear room was used as a storeroom, and the elevator shaft in question extended through the back part of this storeroom. The pile of boxes referred to in the declaration was situated on the third floor near the elevator shaft. The boxes, which were 8 by 16 or 18 inches, contained each about fifty mantle tubes, and they were placed in a pile which extended from the floor to the ceiling, a distance of about fifteen feet.

On the day of the accident the deceased, Max Glick, had been working on the fourth floor, and was sent by his superior to the third floor to set "flexo" wires under the direction of one Kittie Meyers. The main contro-

versy of fact between the parties is as to whether the deceased, in the course of his employment for the defendant, was properly at the place where the accident occurred. The accident happened shortly after lunch time, at 12:50 p. m. There is evidence which tends to prove that one Roland, an employe of the defendant, while standing on the third floor pulled the elevator up to the fourth floor for the purpose of having it unloaded there. While the elevator was approaching the fourth floor and while it was there being unloaded, certain doors of the elevator shaft were left open on the third floor. At this time several employes of the defendant, among them Kittie Meyers, stood about the elevator shaft, evidently waiting for the elevator to return so that some of them might again load it. The deceased, Glick, at this time came into the storeroom, and it is not clear from the evidence heard on the trial whether he intended to perform any labor or work for the defendant at or near the elevator shaft.

The witness Arthur Davidson testified that the deceased was on the third floor a few minutes before lunch and went to lunch with him, and came back to work with him; that they were all at the elevator shaft ready for work - as he put it, "all in one bunch." Kittie Meyers, testifying for the defendant, said that the deceased came into the storeroom after the elevator had gone up to the fourth floor; that he was supposed to work on the third floor; that she did not know what he came back to the storeroom for, that he was not doing any work there, and that she did not direct him to help load or unload the boxes; that he stood there just before the accident talking to her and Roland.

It is not clear from the evidence that Glick

did any work on the third floor during the forenoon. Kittie Meyers, the fore-woman, testified that Glick told her that he was to go to work on the third floor under her in the afternoon, that he had nothing to do upstairs; and that she said she would have a place ready for him right after lunch; that just before the accident she had warned the men standing about the shaft to be careful, that the boxes were apt to fall. Davidson, the only other eye-witness, for plaintiff testified that he and others were loading and unloading boxes near the elevator shaft; that the elevator was operated by hand, by pulling it up hand over hand; that at the time of the accident Glick, the deceased, was standing near him; that they were altogether there in one bunch; that "we were working around those boxes"; that he could not remember just what Glick was doing, but that he was there before lunch about a half hour or so, and that he, the witness, went out to lunch with him.

While it is not perfectly clear what the deceased was doing at and just before the time of the accident, the evidence tends to show that he had a right to be where he was when the boxes began to fall from the pile. One of the witnesses testifies that the deceased was there working about the shaft for about a half hour before lunch time, and the forewoman, Kittie Meyers, testified in effect that she did not know that deceased was doing just before lunch time but that he had been sent to work under her on the third floor. In any event it is quite clear from the evidence that deceased, with her knowledge, was standing near the shaft at the time the accident happened. We think there was sufficient evidence heard on the trial to warrant the jury in finding that the deceased, in the course of his employment for the defendant, was properly at the place where the acci-

dent happened. It is admitted that immediately before the accident he was at the place in question, talking with the forewoman under whom he was at work.

The accident was not caused by a normal change in the conditions attending the work being done at the time for the defendant. There was evidence heard from which the jury were authorized to find that the boxes fell because of insecure piling, and no reason was shown why such insecure condition of the pile of boxes could not have been prevented by the exercise of due care and caution. The rule that an employer is not required to keep in a reasonably safe condition a place where a servant is at work, where the conditions of such place are constantly changing - as in the case of a bridge in the course of construction - has no application where the employe's death was not caused by any changing condition in the prosecution of the work. Casey v. Kelly-Atkinson Co., 240 Ill. 416.

It is urged for defendant that the deceased should have acted upon the warning which it was shown was given by the witness Kittie Meyers that the boxes were about to fall. There is much doubt in the evidence as to whether this warning was given in sufficient time to enable deceased to avoid the accident which caused his death. The jury might reasonably have concluded from the evidence that the falling of the boxes and the movement of deceased which precipitated him into the elevator shaft were almost simultaneous.

We cannot say that the verdict in the case was against the weight of the evidence. There is some contradiction in the evidence as to whether deceased at and immediately before his fall was working at the place where the accident

happened. On this controverted question evidence was admitted to sustain the theories of both parties to the suit, and the question was properly submitted to the jury for its determination. Whether deceased was or was not actually working for the defendant at the precise moment of the accident, the evidence shows that he was rightfully in the course of his employment at the place where the accident occurred. It cannot be said from the evidence in this record that the deceased knew of all the conditions that surrounded him just before he met his death. There is some evidence which tends to prove that he was not looking at the moment either towards the pile of boxes or the elevator shaft. It seems to be conceded that he was engaged in some conversation with the other persons near the shaft, but on the whole record it is far from clear that he had noted the insecure condition of the pile of boxes. There is no evidence from which we can say that this insecure condition was usual or that it had ever existed before the day in question, and it cannot be held that the deceased assumed all the risk of injury by reason of such insecure conditions; they were not usual to the work he was engaged in, nor does the evidence show that they were so apparent that he must be held to have known of them.

The witness Arthur Davidson, who testified for the plaintiff, made a written statement a few days after the accident in question, and it is urged that this statement so successfully impeaches Davidson, who was plaintiff's only witness testifying as an eye-witness to the accident, that the clear preponderance of the evidence is with the defendant. The statement made by this witness does tend to contradict him in one or two important particulars. It

was, however, the province of the jury, who had an opportunity to see and hear the witnesses, to determine how much credence was to be given their testimony, and it cannot be said as a matter of law that the statement of the witness on the witness stand is untrue, while that made a short time after the accident was true. Both statements were before the jury, as also the testimony of the other witness who saw the accident.

It is complained that the court should have given an instruction tendered by the defendant which in effect told the jury that if they believed from the evidence that the deceased, in the course of his duties as an employe of the defendant, was not required to be in that part of the premises where the accident occurred, and that if he, deceased, was at the place of the happening of the accident contrary to instructions given him by his forewoman, then as a matter of law, etc., the defendant owed no duty to keep such place in a reasonably safe condition, and that the plaintiff could not recover, etc. This instruction was properly refused. Our attention has not been called to any evidence in the record from which any inference could be drawn that the deceased had been directed by the forewoman not to be at the place where the accident occurred.

Another instruction which counsel insists should have been given, in substance would have informed the jury that the defendant was not required to keep the place where the accident occurred in a reasonably safe condition unless the jury found from the evidence that the deceased, in the course of his employment for the defendant, was rightfully at such place. The evidence shows that the deceased was rightfully, in the course of his employment, at

the place where the accident happened.

It is also complained that the court erred in giving certain instructions at the request of the plaintiff. We have examined these instructions, and we are not convinced that any reversible error was committed in this particular.

It is insisted that the court should have overruled the demurrer to the plea of the defendant that the suit was not brought within one year after the death of the decedent. The death occurred April 9, 1903. The law then in force provided that actions for the recovery of damages for wrongfully causing the death of a person should be commenced within two years after the death of such person. On July 1, 1903, after the death of plaintiff's intestate, the law was amended so as to provide that such actions should be brought within one year after the death. Plaintiff brought suit on May 4, 1904, and it is insisted that the suit was barred by the statute enacted July 1, 1903. There is some contrariety of opinion in the decisions of the appellate courts of this State on this question; the precise question under consideration here was directly involved in two Appellate court cases, in both of which it was held that a demurrer to a plea similar to that filed by the defendant here was properly sustained. O'Donnell v. Healy, 134 Ill. App. 187; Storm v. C. C. C. & St. L. Ry. Co., 156 Ill. App. 88. We are inclined to agree with the decisions in these two cases. In O'Donnell v. Healy, supra, it was held that the amendment in question did not prescribe a condition to the right of action but fixed a limitation which was not retrospective in its operation.

No error was committed by the trial court in its rulings upon the admission of evidence.

On the whole record we are of the opinion that the

judgment of the Superior Court was proper, and it is affirmed.

AFFIRMED.

356 - 22790

ANNIE BALL,
Appellant,

vs.

IROQUOIS MEMORIAL EMERGENCY HOSPITAL, RICHARD T. CRANE, L. P. PRIESTLEY COMPANY, LANQUIST & ILLSLEY COMPANY, JOHN M. O. PRIBORNE, CITY OF CHICAGO and MURDOCK CAMPBELL,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

205 I.A. 547

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County in favor of the defendants.

In her declaration, consisting of five counts, the plaintiff, Annie Ball, alleged in substance that she was the owner of real estate with a four-story brick building situated thereon, at 25 North Market street, Chicago; that the south wall of said building was and is a party wall, having been erected under a party wall agreement entered into in 1872 between the then respective owners of Nos. 23 and 25 North Market street; that on and prior to May 1, 1910, the property known as 23 North Market street was improved by a four-story and basement brick building; that the building owned by the plaintiff at 25 North Market street and that erected on the lot 23 North Market street were erected more than thirty years ago, and that the party wall was built one-half thereof on each lot; that between May 7, 1910, and September 1, 1910, the defendants tore down, wrecked and removed, or caused to be torn down, wrecked and removed the building at 23 North Market street, and thereafter, between September 1, 1910, and June 25, 1911, erected or caused to be erected a building on the lot known as No. 23 North Market

905 1/4. 544

IN THE DISTRICT COURT OF Clinton COUNTY, STATE OF OKLAHOMA.

Plaintiff,

vs.

Defendant.

No. Petition.

Attorney for Plaintiff.

Address Enid, Okla.

IN THE DISTRICT COURT OF Clinton COUNTY IN THE STATE OF OKLAHOMA.

In the declaration, consisting of five counts, the plaintiff, Linda Bell, alleged in substance that she was the owner of real estate with a four-story brick building situated thereon, at 20 North Harris street, Chicago; that the south wall of said building was not in a part well. having been erected under a party wall agreement entered into in 1910 between the then respective owners of the, 23 and 25 North Market street; that on or about October 1, 1911, the defendant began on 23 North Market street was improved by a four-story and basement brick building; that the building owned by the plaintiff at 25 North Market street and that erected on the lot 23 North Market street was erected more than thirty years ago, and that the party wall was built one-half thereof on each lot; that between July 1, 1911, and September 1, 1912, the defendant tore down, removed and removed the building at 23 North Market street, and caused to be erected a building on the lot known as 1a. by party reference I, 1912, and June 25, 1911, elected or caused to

IN THE DISTRICT COURT OF Clinton COUNTY IN THE STATE OF OKLAHOMA.

street; that in disregard of their legal duty the defendants negligently failed to properly strengthen, reinforce and support the said party wall and its foundation, so that it would not sink or become weakened by the weight of the new building; that the defendants, also, without leave or license, entered plaintiff's premises and excavated underneath the south wall of her building and removed portions of the foundation; that as a result of such unlawful conduct on the part of the defendants the building of the plaintiff and certain machinery and fixtures therein located were ~~xxxxxx~~ damaged, and that she, the plaintiff, was deprived of the use of her building and of the profits of a business carried on by her therein.

It was shown by the evidence heard on the trial that plaintiff's building stood on the lot adjoining and just north of the lot known as No. 23 North Market street, which prior to September, 1910, was improved with a building substantially similar to that of the plaintiff. On July 30, 1908, the premises No. 23 North Market street were leased to the defendant Iroquois Memorial Emergency Hospital for a term of 99 years, and on the same day this defendant re-leased the premises to the City of Chicago for a term of years commencing August 1, 1908. Between May 1st and September 1st, 1910, the old building at 23 North Market street was torn down and the erection of a new building, known at the trial as the Hospital Building, was begun. The lots at 23 and 25 North Market street were in dimensions respectively 20 feet by 70 feet. An alley is immediately south of 23 North Market street, and south of the alley is what is known as the Hearst property. During the summer of 1910 a large number of caissons were sunk on the Hearst property preparatory to the erection of a building thereon, and the whole controversy of fact resolves

itself about the question of whether such injury as in fact was done to the property of the plaintiff was caused by the erection of the hospital building or by the sinking of the caissons on the Hearst property south of the alley.

Touching the question of the cause of the sinking of the party wall referred to, and the effect thereof to plaintiff's building, two witnesses testified for the plaintiff and eight for the defendants. The hospital building was erected upon the old foundations which, according to defendants' witnesses, were found upon examination better adapted to support the weight of the new building than the foundations required under plans and specifications prepared by the architects for the hospital building. The plaintiff's witnesses ~~xxxxxxx~~ testified that the weight of the new hospital building caused the foundations under the party wall to sink and become loosened, which sinking in turn caused a serious injury to plaintiff's building. Plaintiff herself, however, testified that on September 10, 1910, a few days after the erection of the hospital building had begun, she noticed a sagging and settlement of the doors of her building and that they would not close, and that she complained of this to Mr. Grondall, superintendent for the defendant Lanquist & Illsley Company, which was erecting the building. It was satisfactorily shown that at this time the weight of the old building had been removed from the party wall foundation and that no considerable part of the new building had been placed thereon.

Eight witnesses, engineers and architects, testified for the defendants. Their testimony was to the effect that the foundations for the hospital building were sufficient to carry the party wall with the new building joined to it. These witnesses testified that in their opinion the settling

of the party wall and of the other walls of the hospital building was caused by the sinking of the caissons for the Hearst building; they asserted that the south wall of the hospital building, immediately across the alley from the Hearst property, settled before and to a larger extent than the north or party wall of the building; that this settling in fact had taken place before the hospital building had been erected and when the weight on the foundations of the south wall of the hospital building was much less than that which it sustained after the building had been completed.

The eight witnesses who testified for the defendant were men of experience and standing in their profession. The evidence given by these witnesses is, to say the least, quite as reasonable and probable upon its face as that of plaintiff's two witnesses.

It was shown at the trial that the defendant Fridmore was employed as architect-superintendent of the hospital building and that he prepared plans therefor and submitted such plans to the Building Department of the City of Chicago; that the defendant Lanquist & Illsley Company did practically all of the construction work on the building; that after the building was entirely completed the defendant L. P. Priestedt Company was employed to raise the walls of the new building which had sunk as a result of the settling of the building, due, according to defendants' witnesses, to the sinking of the caissons on the Hearst property. By consent of the parties the jury viewed plaintiff's building and also the hospital building. The defendant Richard T. Crane was at the time suit was started president of the defendant Iroquois Memorial Emergency Hospital; the defendant Murdock Campbell was building commissioner of the defendant City of Chicago.

At the close of all the evidence the court instructed a verdict in favor of the defendants Richard T. Crane, the L. P. Friestedt Company and Murdock Campbell. It is not contended that any of the defendants were liable to plaintiff except in so far as they were connected with the construction of the hospital building, and as the evidence shows that the construction of this building did not cause damage to plaintiff there could be no reversible error in instructing the jury to find these particular defendants not guilty. As to the other defendants the case was submitted to the jury, who returned a verdict finding them not guilty.

From an examination of the evidence it is our opinion that the verdict of the jury is well supported by the evidence heard on the trial. There can be no doubt that the great preponderance of the evidence was in favor of the contention of the defendants - that the damage to plaintiff's building, if any, was the result of the work done on the Hearst property, and that it was not at all caused by any conduct of commission or omission of the defendants. In any event, we are at a loss to see how it can be said that in weighing this evidence we could in justice come to a conclusion different from that of the jury.

While several questions of law have been presented to us for consideration, the importance in this case of determining such questions disappears when the evidence is examined and when from such examination it appears that the verdict of the jury as to any and all defendants having any connection with the erection of the hospital building should have been not guilty.

And so as to other questions presented by counsel for plaintiff in their brief, one of which is that the court erred in excluding evidence of the loss of profits

to a business conducted by the plaintiff in her building. There was no basis of fact in the evidence introduced which would authorize the court to admit the evidence, as to a loss of profits, tendered by the plaintiff. Both the plaintiff and her witness Mary Perkinson were unable to furnish any data whatsoever from which an intelligent estimate could be made of the loss, if any, to plaintiff's business. The evidence offered by plaintiff tends to show that she was engaged at the time in question in manufacturing poker chips, roulette tables, playing cards and the like. She was unable or unwilling to give the name of a single customer who had traded with her. Her witness, Mary Perkinson, who seems to have had charge of plaintiff's business, testified that the plaintiff had never kept any record of any kind, books, papers or anything else, except mail orders and the bank pass book; that the mail orders were destroyed from year to year, and that the witness was unable to tell when she had last seen the bank book.

In Central Coke & Coal Co. v. Hartman, 111 Fed. Rep. 96, it was held that "the actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the legal injury and of the amount of damages which resulted from it, before a judgment of recovery can be lawfully rendered."

But the evidence preponderated so greatly in favor of the defendants that the ruling of the court in excluding this evidence, if it was error, was in no sense prejudicial to the plaintiff.

It is also urged that the court erred in refusing certain instructions tendered by the plaintiff. No error was committed in this particular. Practically all of the propositions contained in the refused instructions appear in those given to the jury. The 7th, 10th and 11th instructions given to the jury at the request of the plaintiff fairly instructed the jury as to the law applicable to the branch of the case they were intended to cover. This is particularly true of the 11th instruction, which is in part as follows:

> "One of the questions for you to determine is whether the sinking and settling of the wall was caused by the weight of the hospital building or by the excavation for caissons of the Hearst Building. If you believe that the excavation for the Hearst Building would not have caused the party wall to sink had the new building and the foundations of the party wall been properly supported and strengthened and if you further believe that the party wall settled and sank because of the insufficient foundations and added weight, if any, you are instructed plaintiff is entitled to recover against such of the defendants," etc.

Nor do we think that any reversible error was committed in giving certain instructions tendered on behalf of the defendants.

It was held in Field v. Leiter, 118 Ill. 17, that

> "A party wall is a structure for the common benefit and convenience of both the tenants it separates, and either party will be allowed to make any use of it he may desire, either by deepening the foundation or increasing the height, so far as it can be done without injury to the other."

The defendants had a legal right to erect a hospital building and to use therefor and to occupy the party wall in question; whether in doing so they did or did not

cause injury to the plaintiff was a question of fact for the determination of the jury, and, as heretofore said, there is in the record an abundance of evidence to support the conclusion of the jury that defendants had not by their conduct caused any damage to her building.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

376 - 22810

JOHN MORRISON,
Appellant,

vs.

JOHN R. LAVERTY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 549

MR. JUSTICE DENEN DELIVERED THE OPINION OF THE COURT.

Suit was brought in the Municipal Court by the plaintiff, John Morrison, against the defendant, John R. Laverty. Plaintiff, at and before the time suit was brought, was the owner of certain real estate in the city of Chicago; title to this real estate was in his name; it consisted of a two-flat building, one of which flats was occupied by the plaintiff and his family; the other, on May 1, 1915, was by written lease rented by Catherine Morrison, wife of the plaintiff, to the defendant; the plaintiff's wife is named in the lease as grantor and the defendant as grantee.

There does not seem to be much dispute as to the facts of the case. The evidence tends to show that the lease was made by Catherine Morrison in her own name, and that she, during the whole course of defendant's tenancy, had collected the rents due under the lease and had given receipts therefor in her own name. There is some dispute in the evidence as to whether a prior lease for one year, terminating May 1, 1915, was executed in the name of plaintiff's wife. The plaintiff testified that his wife, with his knowledge, had rented the premises to the defendant, and that she had acted as his agent until October, 1915; that on October 28, 1915, he notified the defendant in writing that

after said date another agent, mentioned in the notice, was authorized to collect the rents due for the premises occupied by the defendant. Suit was brought to recover rents for the months following October, 1915. Judgment was entered in favor of the defendant, and the plaintiff brings the case here by appeal.

In an amended statement of claim the plaintiff set forth that the defendant was indebted to him for the use and occupation of the premises for six months at the rate of $25 per month. It appears that the lease under which the defendant held the premises was admitted in evidence at the trial for the purpose of showing the rental value thereof only. It is admitted that the defendant has paid to Catherine Morrison the rent due for the premises under the lease. It was shown that the defendant knew the plaintiff but slightly, that he had seen him but rarely during the time that the defendant had occupied the premises, and that he had no knowledge whatsoever of the plaintiff's ownership or interest in the premises. The defendant had dealt with Catherine Morrison; the lease in question was made in her name, and so far as the defendant knew or had reason to believe she was the owner of the premises.

The position of the plaintiff seems to be that the contract was made by his agent and for his benefit, and that that being so he had a right to bring an action thereon. The statement of claim filed by the plaintiff, however, indicates that he is not suing upon the lease, but that suit is brought for the use and occupation of the premises; the lease was admitted in evidence solely for the purpose of aiding in fixing the value of the premises so used and occupied. Plaintiff here seeks to recover rent under the lease which he insists was made by his agent. In his state-

ment of claim his action is based upon the use and occupation of the premises by the defendant. In the Municipal Court the case was tried upon the theory which the plaintiff advanced in his statement of claim; in this court it is sought to recover under the lease. The plaintiff has no right to advance a theory of recovery in this court different from that presented in the trial court. On the theory of plaintiff as stated by him in his statement of claim the judgment of the Municipal Court was correct. In his statement of claim plaintiff did not rely upon the lease; no reference is made therein to the lease, and the terms of the lease were not therein referred to in any way, either as to a covenant to pay rent or otherwise. The defendant set up the lease at the trial as a defense to the action brought by the plaintiff. Under the lease he was authorized to occupy the premises and to pay the rent provided by the lease to the grantor, Catherine Morrison. She assumed, with the knowledge of the plaintiff, to have the right to rent the premises and to collect the rents; the defendant's contract was with her and not with the plaintiff. If she in fact acted for the plaintiff, then the plaintiff, in a proper proceeding, might have asserted his right to a performance of the contract made for his benefit. This was not, however, his theory in the trial court.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

395 - 22829.

JOHN F. DEVINE, Administrator of the Estate of GEORGE HINZENSTERN, deceased,

Appellee,

vs.

ERIE RAILROAD COMPANY, a corporation,

Appellant.

APPEAL,

CIRCUIT COURT,

COOK COUNTY.

205 I.A. 550

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

From a judgment of $2,000 entered upon the verdict of a jury, defendant prosecutes this appeal.

Plaintiff's intestate, it is contended, came to his death under circumstances which are attributable to the negligence of defendant. George Hinzenstern, the victim of the accident, was a cooper in the employ of W. J. Connors, who had what is known as a "stevedore" contract with the defendant. Hinzenstern was working in a gang of stevedores as the servant of Connors, the stevedore contractor. In this employment Hinzenstern had worked for several years. The relation of master and servant did not exist between Hinzenstern and defendant, but that relationship existed between him and Connors.

Hinzenstern's duties as a cooper required him to work around the docks and shipping on the Chicago River. On the day of the fatality, October 11, 1910, the steamer Chemung, owned by defendant, went to the Wabash dock in the Chicago River about one o'clock in the afternoon. The work at the Wabash dock being completed, the Chemung proceeded to cross the river for work at the Burlington dock, the next objective point for work. At this time Hinzenstern

the next lighting night for them. If this movement
seems to close the story for most of the Darlington and,
as the Tatham suit ended complete, the Canning Par-
ish Clearance Fund ended a story in the evening. The
Clearance Fund, owned by Archdeacon, went to the Tatham fund in
the day of the Jubilee, October 21, 1810, the amount
in which was £1,800 exceeded the original estimate
of a year, by £4,800 exceeded even the earlier
figure. Subscribers presumably this appeal.

Clearance's interest, it is mentioned, came to his
death under circumstances which are attributable to the
negligence of Defendant. George Clearance, the victim
of the accident, was a cadger in the employ of T. W. Cousins,
who had work in hand on a "phaeton" entered with De
Defendant. Clearance was waiting in a yard of Cheapside
on the morning of January, the otherwise employed.
This employment increased his normal income.
The evidence at hearing was entered did not exist between
Clearance and Cousins, but that mysteriously existed
between the two Cousins.

Clearance's claims to a cadger required him to
wait around the yards and display in the morning time.
On the day of the fatality, October 21, 1810, the steward
Cousins, owned by Defendant, went to the Talbot Yard to
the Clearance find waited one o'clock in the afternoon. The
yard as the Tatham suit ended complete, the Canning Par-
ish Clearance Fund ended a story in the evening. The
next lighting night for them. If this movement

was on the Chemung, where he might have remained and have crossed to the Burlington dock, but this he did not do, but after the boat started to move he got off the boat onto a 12 x 12 planking at the outside of the dock. This was a place of danger, where Hinzenstern had no right to place himself. He had no work to do in that place nor was it necessary for him to be there en route to the Burlington dock. Hinzenstern placed himself in this perilous position of his own volition and without any order or direction from his employer or the servants of defendant on or off the Chemung. After reaching the dock he started to walk toward the north end of the Chemung as if he wished to get into No. 4 gangway. When he arrived at No. 4 gangway, however, the Chemung had swung so far out into the river that he could not step across into the boat. Thereupon he returned to No. 3 gangway, where the witness Primm was standing, who reached out his hand to deceased with the apparent intention of helping him jump into the boat, but the boat was about two feet from the dock and deceased hesitated and said he could not take a chance and started down the planking toward the north end of the Wabash freight house.

It is clear from the evidence that the manoeuvres of the Chemung in swinging from the Wabash dock and backing into the Union slip were usual and customary and as theretofore practiced in going from the Wabash to the Burlington dock. It is further evident that the deceased was familiar by years of personal contact with the methods used in moving the Chemung from one dock to the other and that the dangers which lay in the wake of his actions were

known to him. The Chemung was manoeuvering by means of a winding line, which line was a large hawser which ran from the capstan on the spar deck at the forward end of the boat through a chalk in the side of the boat down onto the ground behind the spiles and back to the rear spile. The capstan was about sixteen feet above the water. Owing to the current in the river boats are moored to the docks by lines fore and aft. When the stern lines are cast off, the winding line or hawser is placed over the rear spile and then the capstan is started. The winding line tightens with the strain put upon it by the winding of the capstan and ultimately slips off with tremendous force.

When at the time of the accident the winding line slipped off the spile, it evidently struck the deceased, who was seen by some of the witnesses whirling in the air and to fall into the river. While attempts were made to rescue him, he sank and his body was not recovered for several days thereafter.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence in the case, defendant moved for a directed verdict in its favor and tendered the usual instructions. Both motions were denied. While other errors are assigned and argued, we rest our decision on the failure of the court to direct a verdict as requested.

No ground of liability on the part of defendant was proven, and from the proofs it was evident that the death of deceased was not caused by any act of negligence on the part of defendant, either of omission or commission, and

that the conditions which led to the unfortunate accident were in no aspect of the case attributable to any negligent conduct on the part of defendant or its servants in charge of the Chemung. From a place of safety deceased, without any apparent reason, put himself in a situation fraught with peril, which, from his being familiar with the manoeuvres of the Chemung and of the manner in which those manoeuvres were made, he must be presumed to have had knowledge.

It is likewise proven that at the time the Chemung was ready to be moved from the Wabash dock and all was in readiness for that operation, that the junior officers, before announcing to the captain the readiness of the Chemung to be moved, made careful observations to see if there were any obstructions between the ship and the dock or any persons on the dock, and they found that the ship was clear from obstructions and there was no one upon the dock except the watchman and a deckhand, who threw off the lines; that it was after the making of such observations that deceased went from gangway No. 3 to the dock, so that at the time when the Chemung was started on her manoeuvres to back into the Union slip for the Burlington dock, its officers had no knowledge of the deceased's presence upon the dock; neither had they any reason to suspect that he or anyone else except the line men would be there.

With deceased's familiarity with conditions, he must be presumed to have known that when the whistle blew the boat would move. Furthermore, the relationship of the parties to each other did not require defendant to give deceased any notice of the movement of the Chemung. Manthei v. Belt Ry. Co., 116 Ill. App. 330, affirmed in 232 Ill. 568;

O'Day v. C. & A. R. R. Co., 97 Ill. App. 632.

As held in Sutton v. Wabash R. R. Co., 152 Ill. App. 138, there can be no recovery where deceased was not in a place where his work required him to be, and the only duty which defendant owed him was not to wilfully or wantonly injure him.

As deceased voluntarily put himself in a position of danger in preference to that of a place of safety, he was so lacking in due care for his own safety as to inhibit a recovery. Wilson v. I. C. R. R. Co., 210 Ill. 603.

As the deceased was not in the exercise of due care for his own safety but was guilty of contributory negligence, which was the primary cause of the accident which caused his death, the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Fisher v. D. & R. E. R. Co., 37 Ill. App. 283.

As held in Quinn v. Illinois S. R. Co., 192 Ill. App. 128, there can be no recovery where deceased was not in a place where his work required him to be, and the only duty which defendant owed him was not to wilfully or wantonly injure him.

As deceased voluntarily put himself in a position of danger in relation to that of a place of safety, he was no looking in any case for his own safety as to inhibit a recovery. Tilson v. E. E. R. R. Co., 219 Ill. 538.

As the deceased was not in the exercise of due care for his own safety but was guilty of contributory negligence which was the primary cause of the accident which caused his death, the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

395 - 22829. FINDING OF FACT.

The Court finds as an ultimate fact that George Kinsenstern, deceased, was not in the exercise of ordinary care for his own safety at the time of the accident which resulted in his death, but that on the contrary he was guilty of contributory negligence which was the proximate cause of the accident.

Ritual de Paz.

414 - 22948.

ANTHONY MOROLEWSKI, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
RICHARD McCURRIE, et al, Appellants.	)	COOK COUNTY.

205 I.A. 551

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries which resulted in a verdict and judgment in favor of plaintiff and against the defendant Richard McCurrie for $2650, and McCurrie appeals.

The suit was originally commenced against the American Laundry Machinery Company, Lord & Bushnell Company and Richard McCurrie. At the trial plaintiff took a non-suit as to the American Laundry Machinery Company and the cause went to the jury against Lord & Bushnell Company and Richard McCurrie. The verdict was in favor of the Lumber Company and against McCurrie.

The gravamen of the action as gathered from the declaration is the failure of defendant to provide a reasonably safe place for plaintiff to work in and in neglecting and failing to provide a reasonably safe means to prevent plaintiff from being struck and hit and to prevent the lumber from falling from the wagon and in defendant's wrongfully allowing and permitting the lumber to fall and be turned over and thrown upon and against the plaintiff.

The facts are, briefly, that plaintiff was a laborer in the employ of the American Laundry Machinery Company and had been in such employ for about six years prior to the

accident. The Lord & Bushnell Company were dealers in lumber. On the day of the accident Lord & Bushnell were delivering a wagon load of lumber to the Laundry Company. One McCormick was the driver of the wagon and directed its unloading upon the premises of the Laundry Company. At the work of unloading the plaintiff assisted under the direction of McCormick. The defendant Richard McCurrie, against whom is the judgment appealed from, was the husband of Rose McCurrie, whose servant McCormick was proven to be. The manner of the occurrence of the accident was in this wise:-

A number of loads of lumber had been delivered to the Machinery Company on the morning of the accident, at the unloading of which plaintiff had assisted. When the load of lumber in question arrived, plaintiff told McCormick where to put the lumber. The lumber was piled high in the wagon. A chain was fastened around the lumber to keep it tight. There were two stakes on each side of the wagon to keep the lumber in position. McCormick, in the presence of plaintiff, removed the chain from the lumber and shook the stakes before removing them. McCormick pulled out the front stake and started to hand lumber to plaintiff from the top of the pile and plaintiff passed such lumber as he pulled it off the pile from the wagon to a co-laborer, who carried the lumber into a place upon the premises of the Laundry Company. This work had been going on before the noon hour and was resumed after the men had partaken of their noon-day meal. McCormick was on top of the lumber. He picked up the sticks of lumber and swung them around at right angles, so placing the same that one

end was taken hold of by plaintiff while the other end was on the edge of the wagon. When a stick of lumber came to the hands of plaintiff he would draw the piece along the edge of the pile until it had cleared the top and then pass it on to his co-worker. A short time after the resumption of work in the afternoon, plaintiff took hold, in the usual way as theretofore, of one of the sticks of lumber and, as he had theretofore done, pulled it along the edge of the pile. Plaintiff so pulled this particular stick of lumber that the end tier was pulled out of line, causing the lumber to tumble over upon plaintiff, hitting and injuring him.

The state of the pleadings is of little importance, for whether they are sufficient or not, the evidence utterly fails to fasten any cause of action upon the defendant Richard McCurrie, against whom the recovery was had. Whatever the risks of unloading the lumber may have been, they were obvious to plaintiff and the law required that he use reasonable care and caution to avoid being injured in the unloading operation. This, the evidence establishes, he utterly failed to do. The injuries which he sustained are attributable to his own negligent conduct and want of care in handling the lumber. He, by his carelessness, pulled the lumber from the wagon down upon himself. The accident was caused by his own negligent conduct. The evidence fails to establish that any of the original defendants in the cause, including Richard McCurrie, were guilty of any negligence which was either the proximate or even remote cause of the accident.

It is contended that McCormick was in the employ of defendant and in charge of the unloading of the lumber at the time of the accident and was acting as vice-principal; that what plaintiff did in the unloading of the lumber he did under the orders and direction of McCormick. The evidence discloses the fact that McCormick was the employe of Rose McCurrie and not of Richard McCurrie. This fact entirely exculpates the defendant in this appeal from any liability or responsibility to plaintiff. However, if McCormick was in the service of defendant in the circumstances of the accident no actionable liability would attach to defendant.

Holding as we do that the accident to plaintiff for which he seeks compensation in this action and for which he recovered the judgment now in review was caused by his own negligent conduct, upon well settled principles of law he is not entitled to recover for the injuries suffered as a consequence of his own negligent conduct. The burden of proving that plaintiff at the time of the accident was in the exercise of due care for his own safety and that his negligence did not contribute to cause the accident and that his injuries were suffered as the proximate cause of the negligence of defendant rested on plaintiff. This burden he failed to sustain by adequate proof.

Therefore, the judgment of the Circuit court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

414 - 22848. FINDING OF FACT.

The Court finds as an ultimate fact that the accident to plaintiff and the resulting injuries to him were caused proximately by his own negligence and that defendant is not guilty of any of the acts of negligence charged against him in any of the several counts of plaintiff's declaration as amended.

425 - 22859.

FRED G. HUNTER, Appellee,

vs.

BUSH HAT COMPANY, a corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 557

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff was a salesman for defendant and left its employ and entered into the service of a rival house. He commenced this suit for wages alleged to be due, and defendant put in a set-off for the value of samples claimed to have been received by plaintiff and not surrendered to defendant. Plaintiff, on the cross-action, denied the indebtedness and claimed a settlement. Defendant in response to plaintiff's claim denied any indebtedness to him. On a trial before the court there was a finding against both the claim and the set-off and a judgment against plaintiff for costs. With this finding and judgment plaintiff is content, but defendant prosecutes this appeal.

An examination of the testimony impresses us with the correctness of the conclusions of the trial judge and that he might reasonably find therefrom as he did.

The questions were entirely of fact, and whether the propositions of law tendered were right or wrong in no way affected the conclusions of the court upon the facts.

Much ado is made regarding certain rules of the Municipal Court, but none of them was invoked in the trial

of the cause and no ruling on any one of them was requested or made upon the trial. They seem to have been used in argument but have no relevancy to any point presented to us. Moreover, we are not able to discover that measuring defendant's rights by these rules, either its defense to plaintiff's claim or its prosecution of its claim of set-off, were injuriously affected. The decision of the trial judge was grounded upon a settlement by the parties of their several claims, and such conclusion was warranted both by the evidence and the affidavits which constituted the pleadings of the parties.

There is neither error of law nor procedure in this record, and consequently the judgment of the Municipal Court is affirmed.

AFFIRMED.

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437 - 22871

EMANUEL P. SELZ,
Appellee,

vs.

JAMES W. STAFFORD,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 558

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for $2358.19 on a verdict directed by the trial Judge, from which defendant prosecutes this appeal. The action arose under a lease from David B. Lyman, trustee, lessor, to defendant as lessee, demising certain parts of a building on the northwest corner of Wabash avenue and Harrison street, Chicago, in which defendant operated a hotel known as the Commercial Hotel. Plaintiff was the assignor of the lease to Lyman as trustee. The lease was for ten years and expired by limitation April 30, 1916. The rental was payable in monthly installments of $1165 each, and in addition thereto were certain water rents and other charges in the nature of rent. The lessor agreed to pay the lessee $300 a year in monthly installments of $25 each for supplying heat for that part of the building which the lessor did not demise by the lease.

The action was commenced as of the fourth class, and as originally brought was dual in its nature - first, in forcible detainer for the possession of the premises, and, second, for the recovery of the amount due as rent for the months of March and April, 1916.

Plaintiff filed a sworn statement of claim in which he claimed for March and April, 1916, rent and $78.19 for water rates paid by him for defendant, which together

437 - CIRCUIT

[illegible] v. [illegible].

[illegible].

vs.

[illegible].

[illegible] e. [illegible].

[illegible].

[illegible].

[

made the demand $2408.19. Defendant interposed an affidavit of defence, denying any indebtedness, and then set up a counter claim for a long list of delinquencies upon the part of the lessor which ranged from a failure to make the changes and alterations and improvements in the building which the lessor had by the terms of the lease agreed to make, to the invasion of the possession by defendant, and the renting of a store for a saloon, contrary, as he claims, to the terms of the lease, in which saloon unseemly and noisy conduct was practiced, to the disturbance of the hotel guests, and to which employees of defendant resorted and imbibed intoxicating liquors to such an extent as rendered some of them incompetent for service, to the damage of defendant. However, nowhere in the affidavit was it denied that defendant had been in possession of the demised premises during all of the term of the lease, which expired April 30, 1916, after the action was commenced; nor was it denied that he had paid all the rent reserved to be paid by the terms of the lease for the whole term thereof with the exception of the two months rent and the item for water rent claimed by plaintiff in his statement of claim.

Defendant claimed that by reason of the matters set up in his affidavit of defense and counter claim he had been damaged to the amount of $20,000. On motion the first affidavit of defense and counter claim were stricken from the files, and on like motion the affidavit and counter claim filed in place of the one stricken was also stricken from the files, and the cause proceeded to trial as in cases of default; and if the rulings of the court in striking the defenses were without error, the procedure in the assessment of damages, directing a verdict and in entering judgment, was according to precedent and the rules of the trial court.

Thirty-five assignments of error appear upon the record, but in the conclusion to which we have come it will be unnecessary to pass upon them seriatim. On the insistence of defendant a jury was called to assess damages, and this was done upon the statement of claim and the testimony of one witness in support thereof. The evidence of the witness sustained the items of the claim and added thereto a credit of $50 for March and April as compensation to defendant for furnishing steam heat to the retained portion of the building in which the leased premises were situated as provided by the terms of the lease under which defendant held. Defendant contends that the trial Judge should have determined both issues - the question of possession and of the amount due plaintiff.

Upon entering upon the trial counsel for plaintiff stated that defendant had surrendered possession of the premises on the 28th of April, 1916, and that the only matter left for the court to try was the amount of money due plaintiff on its claim for rent. We think it clear that the surrender of possession by defendant to plaintiff eliminated the controversy regarding such possession and in a manner automatically disposed of the forcible detainer part of the proceeding, and, in the condition of the pleadings simply left for determination the dispute as to the amount of rent due. The fact of surrender was not challenged by defendant and therefore on that branch of the case there was nothing in dispute. The question of possession at the time of the trial of the action was not in dispute; therefore to have proceeded to try a moot question would have been a work of supererogation, which the law will not tolerate.

It is also contended that as no copy of the lease

was attached to the statement of claim or offered in evidence, the judgment was not sustained by that quantum of proof which the law requires. Defendant being in default, admitted every material averment of plaintiff's statement of claim. The lease, as such, was not necessary as evidence to sustain the sworn statement of claim. The claim was liquidated, and while defendant had the right of cross-examination to minimize damages, he made no effort in this regard. Brown v. Gerson, 182 Ill. App. 177. The Municipal Court Act does not require a copy of the instrument sued upon to be filed with the statement of claim. Guerra v. Rocco, 181 ibid. 528.

Defendant challenged the jurisdiction of the court to enter judgment in excess of one thousand dollars for the reason that the action was commenced as a fourth-class case. Under Rule 14 of the Municipal Court, procedure shall be the same in first-class as in fourth-class cases, and it has been held that a case in the fourth class is what the evidence makes it. Paris Flouring Co. v. Imperial Cotto Milling Co., 181 Ill. App. 218; Doherty v. Schipper & Block, 157 Ill. App. 413; Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311. The jurisdiction of the court is not affected because the action was commenced as of the fourth class. Furthermore, this objection comes too late when made in this court for the first time.

Defendant by his affidavit of set off and counter claim, in which he stated in one place that his damages exceeded the claim of plaintiff, and, in another place, that such damages amounted to $20,000, conceded that the court had jurisdiction to enter a judgment in favor of either party in excess of one thousand dollars. Hill Construction Co. v. C. R. I. & P. Ry. Co., 174 Ill. App. 600.

The court having jurisdiction of the parties and of the subject matter, its judgment as to the amount thereof was within its jurisdiction and cannot be challenged for the first time in this court. The amount of rent claimed in the statement of claim stood admitted by reason of defendant's default; and notwithstanding that it did appear that defendant surrendered possession of the leased premises two days before the expiration of the month of April, still as the liability was fixed by contract, there can be no apportionment of rent for the two days of the term remaining after surrender. It is plainly apparent that the affidavit of defense and counter claim, whether of set off or recoupment, did not state a cause of action against plaintiff in which recovery could be had in the pending suit. It is not disputed that defendant remained in possession of the leased premises during every month covered by the demise and that he paid rent in accordance with the terms of the lease during all of that time with the exception of the two months here sought to be recovered for. We think that such conduct and actions on the part of defendant amounted to a waiver of any right to claim damages. It was held in Truman v. Reiss, 175 Ill. App. 351, that "as long as the tenant continues in the use and occupation of the premises, he cannot offset as against the rent contracted to be paid any damages by reason of inconvenience to him in such use and occupation, and any conduct of the landlord which merely tends to diminish the beneficial enjoyment of the premises cannot be offset as against the rent contracted to be paid. In Orcutt v. Isham, 70 Ill. App. 102, it is held that all complaints that may have existed in the past are waived by the tenant paying all the rent for the months in which occasion for complaint existed."

There are many other authorities to like effect. But there is a more insuperable obstacle than this to the enforcement of defendant's counter claim. If it is to be considered as a set-off - and in the majority of instances where defendant's counsel have referred to it he characterizes it as a set-off - then as it is for $20,000, which largely exceeds the amount of plaintiff's claim, it violates Section 12, Chap. 98, R. S., which limits the amount of set-off to the amount of the plaintiff's claim. First National Bank v. Bryant, 185 Ill. App. 119; Reid v. McKinney, No. 22336 in this court, not yet reported.

Furthermore, whether the counter claim of defendant may be regarded as set-off or recoupment, it is a claim for unliquidated damages, which character of claim can neither be set off nor recouped against a claim for liquidated damages. Reid v. McKinney, supra; Maeden & Co. v. Hogan, 189 Ill. App. 589; Turnbull Joice Lumber Co. v. Chicago Lumber & Coal Co., 152 Ill. App. 347.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

442 - 22876

IGNACY KUBIATOWSKI,
Appellee,

vs.

HENRY PRATT BOILER & MACHINE COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

205 I.A. 560

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $5,000 entered upon the verdict of a jury after remittitur from such verdict of $3,000. The relation of the parties at the time of the accident was that of master and servant, and the action is for personal injuries. Many errors and two cross-errors are assigned upon the record, but we shall notice and discuss only such points argued as we deem necessary as reasons for the conclusion at which we have arrived.

The cause went to the jury under the second count of the amended declaration and a plea of not guilty. The other two counts were eliminated by the trial Judge. The action of the court in eliminating these two counts is assigned as a cross-error by plaintiff. We think this objection pointless. The case as proven was fairly and minutely stated in the second count. However good in law the excluded counts may have been, they served no useful purpose by being retained in the record. If we should take counsel seriously and reverse the judgment and remand the cause for another trial under the three counts of the declaration, we think counsel would be much disappointed, for they have already attained for their client in the trial being reviewed all they are entitled to. Prolixity of

pleading is not to be encouraged. Lawyers may some day learn the one good count is all that is needed to support any cause of action. In most cases more tend to confusion. The difficulty rests in the ability to draw one count which shall state the entire cause of action; many counts are consequently drawn in the hope that at least one may hit the mark. We think the learned trial Judge exercised much wisdom when he clarified the situation by sending the cause to the jury on the one good count. We will dispose of the other cross-error by saying that the record discloses that the remittitur of $3,000 from the verdict was voluntary and therefore not reviewable. If plaintiff desired a new trial, the way was open by refusing to remit from the verdict. The parties are entitled to nothing on appeal which they could have voluntarily obtained in the trial court.

Plaintiff was a laborer in the employ of defendant, and was hired by Grimm, the foreman. About five or six days before the accident Grimm sent plaintiff to work in the boiler shop and told him to go to Swiergocki, under whose direction he should work. He worked on an electric drill under Swiergocki's direction and tutelage. On the day of the accident plaintiff was engaged under the direction of Swiergocki in hoisting a large steel plate in semi-circular form, twelve feet from tip to tip and six feet through the center, and weighing about half a ton. It was upon the floor and was to be raised and placed upon the table of a drill press, which was four to five feet above the floor. Plaintiff was not familiar with the dangers attendant upon this operation nor of the method of accomplishing the raising of the plate, and necessarily trusted absolutely to Swiergocki, under whom he worked. What plaintiff did in an attempt to hoist the plate was done under

the direction of Swiergocki. The plate was to be hoisted by a clamp with two jaws fastened together by a bolt, which was screwed with a nut. The accident resulted from the insufficient strength of the bolt used. This bolt is in evidence, and bears unmistakable marks of its insufficiency. Another bolt should have been used; the bolt which should have been used is also in evidence, and an examination of it impresses us with the opinion that it was powerful enough to withstand the strain to which it would have been put if it had been used, as it should have been, to hoist the plate. The bolt used was not fitted for the clamp. This Swiergocki knew, and he told plaintiff to get another bolt, the right bolt, the bolt which should have been used, but plaintiff was unable to find the bolt and Swiergocki thereupon directed him to do the work with this insufficient bolt. Swiergocki took a chance, which resulted disastrously to plaintiff. When the plate was hoisted the bolt broke, the plate fell against plaintiff and seriously injured him.

The second count of the declaration charged that defendant did not regard its duty, but on the contrary carelessly and negligently, through its vice-principal or superior servant, ordered and commanded the plaintiff and coerced plaintiff to place the aforesaid clamp upon the top of the edge of said steel plate and nut upon each side thereof, and put a bolt through one side or jaw of said clamp, and through a hole in said plate and put a nut thereon, and ordered and directed plaintiff to raise said plate with the use of the chain block while the clamp was negligently fastened to the plate.

This raises the question of whether plaintiff and Swiergocki were fellow servants or whether Swiergocki was a vice-principal. We think the jury might fairly find

from all the evidence that plaintiff was not a fellow servant of Swiergocki, but that plaintiff was working at what he did at the time of the accident under the direction and command of Swiergocki, who was a vice-principal standing in the place of the employer of plaintiff and directing plaintiff how to do the work in hand. That Swiergocki was an experienced hand who had long been in the employe of defendant can, from the evidence in the record, hardly be gainsaid; that plaintiff knew nothing about machinery, that he was unfamiliar with the English language and necessarily depended upon the directions of Swiergocki in the doing of his work, including the work which resulted in his harm, is also fairly determinable from the record.

It is also contended that plaintiff was guilty of contributory negligence, which was the proximate cause of the accident. This was a question for the jury, and under all the circumstances, including the environment of the parties and their relationship to each other, it was for the jury to say whether this contention was well made. With the jury's finding on this point we see no reason to disagree. The action of the court in failing to direct a verdict for the defendant was without error, as it cannot be said that plaintiff's evidence standing alone, uncontradicted, would not support a verdict in his favor. An examination of the evidence found in the record leads us to the conclusion that its preponderating weight is sufficient to sustain the verdict.

Complaint is made of the exhibition of plaintiff's injured limb to the jury. Such objection seems to rest upon the rather novel proposition that defendant's counsel had no notice that the limb was in such a bad condition

and therefore the exhibiting of it to the jury created a more unfavorable impression against defendant in the minds of the jury than its counsel had reason to suspect. This may even be so, but that would not make the exhibiting of the limb error. It was, as a matter of fact, a question for the jury to decide, whether the plaintiff's injuries were attributable to the accident or to gross neglect in ignoring the advice of competent physicians in endeavoring to be healed of these injuries. This matter was pressed upon them by counsel for defendant from evidence appearing in the record. We cannot say, any more than could the jury, that the injuries for which plaintiff has recovered compensation are attributable to such neglect.

While a large remittitur was made from the verdict, still we are unable to say from the evidence that the verdict of the jury is attributable to either passion or prejudice.

There is no reversible error in the rulings of the court on procedure, there is no complaint regarding the court's instructions to the jury, and, on the whole record, we are inclined to the opinion that justice has been done under well settled rules of law and that the judgment of the Superior Court should be and it therefore is affirmed.

AFFIRMED.

VANITY".

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452 - 22886

OUR SAVIOR NORWEGIAN EVANGELICAL LUTHERAN CONGREGATION OF CHICAGO, a corporation,
Appellant,

vs.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 561

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon the verdict of a jury for $105.53, which plaintiff recovered against defendant and from which plaintiff prosecutes this appeal.

This court has heretofore stricken the bill of exceptions from the record, leaving the statutory record only in the case.

Twenty-three errors are assigned upon the record as grounds for reversal, among which the judgment is said to violate both the federal and state constitutions. However, we cannot heed any of the many errors assigned, as they are only solvable by reference to the bill of exceptions, and as there is none in the record we cannot examine into any of the errors assigned. As a result of this condition of the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

416 - 22850

JOSEF HAROVSKY,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY and UNITED STATES EXPRESS COMPANY.

On Appeal of
CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 570

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, alleging that he received injuries because of negligent management by the Chicago City Railway Company of one of its street cars, and by the United States Express Company of one of its wagons, upon trial had a verdict and judgment against both defendants for $2,000. By separate appeals the defendants seek a reversal.

From the variant stories of the witnesses the jury could properly find that as the street car was running south on Halsted street approaching Congress, a cross street, the Express Company's wagon, horse drawn, came from the west on Congress into Halsted and attempted to cross the track northeasterly in front of the approaching street car; that the horse was trotting and could be seen by persons on the front platform of the car some twenty feet west of the west line of Halsted, but that the motorman made no attempt to stop his car until a few feet from the cross street; that although neither the car nor the wagon indicated any intention to slacken speed to permit the other to pass, each continued with the apparent intention of forcing the other to yield the right of way. Presumably the jury was of the opinion

[illegible]

[illegible]

[illegible]

that each party was asserting a superior right to the cross street until it was too late to avoid a collision, and in so acting each was guilty of the negligence charged. The inevitable result of this conflict of purpose was a collision, the car striking the wagon, knocking it towards the east side of Halsted street on which plaintiff was walking; he was knocked down by the wagon, receiving a fracture of the ribs and other injuries.

It is of no importance that we might be of the opinion that the driver of the express wagon was guilty of the greater degree of negligence; we cannot apportion the damages upon any doctrine of comparative negligence of the defendants. There was ample evidence for the jury to be of the opinion that the motorman, after he became aware of the threatened collision, had sufficient time to stop the car so as to avoid it. Under such circumstances we are unable to say that the verdict of the jury finding the defendant Chicago City Railway Company guilty of the negligence charged was manifestly contrary to the weight of the evidence.

It was not error for the court to refuse instruction No. 1 tendered by the Railway Company. This instruction is not applicable to the facts in this case; it is predicated upon a situation where a plaintiff is suddenly placed in a position of danger, and undertakes to state the duty of a defendant in such a situation. Here the plaintiff was upon the sidewalk, which is not a place of danger ordinarily, and certainly not a situation which of itself would demand any special conduct on the part of the Railway Company. It was not necessary to instruct as to any particular action by the motorman when he should become aware of danger to pedestrians on the sidewalk. The motorman was incapable of any preventive action

after the wagon had been struck by the car and was knocked towards the plaintiff.

The addition made by the court to defendant's instruction No. 42 was not prejudicial; it simply stated the fact that the plaintiff in his declaration had not charged the United States Express Company with violating any ordinance. Without this addition the jury might have been misled in construing the entire instruction as holding that the United States Express Company was guilty of negligence if they should find that it had violated any ordinance. We do not think that the jury would construe this instruction to mean that they should not consider the question of a violation in determining whether the motorman of the car was negligent.

We are not persuaded that the verdict against the Chicago City Railway Company was manifestly against the weight of the evidence, and as there were no prejudicial errors upon the trial the judgment is affirmed.

AFFIRMED.

463 - 22897

JOSEF HAROVSKY,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY and UNITED STATES EXPRESS COMPANY

On Appeal of
UNITED STATES EXPRESS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

205 I.A. 571

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

What we have said as to the facts in case No. 22850, same title as above, opinion this day filed, is applicable to the appeal of the United States Express Company.

Even if we should have had any doubt as to the negligence of the motorman operating the car of the Chicago City Railway Company, we are entirely free from doubt as to the negligence of the driver of the wagon of the United States Express Company. The jury was abundantly justified under the evidence in finding that the conduct of the driver of the express wagon was negligence which, together with the negligence of the motorman, caused the accident in question as charged in plaintiff's declaration.

Counsel for the Express Company strongly argue that the accident to plaintiff did not happen in the manner claimed by him. While a very plausible argument is presented based upon measurement of distances and the speed of the vehicles, yet against this we have the testimony of the plaintiff and one other witness that he was struck by the wagon, and also the undisputed fact that just before the collision plaintiff

[illegible]

[illegible]

[illegible]

was walking on the sidewalk in good physical condition, and the instant thereafter was lying on the sidewalk unconscious, with fractured ribs and other injuries. No other explanation of this sudden change in plaintiff's condition is suggested, and we are not seriously impressed with the contention that this was brought about in any other way than as testified to by the plaintiff.

The argument that the jury should have found that plaintiff was guilty of contributory negligence is not convincing. The point seems to be that plaintiff was not spry enough to dodge the wagon. The evidence tends to show that plaintiff was not aware of the danger until it was too late to escape.

It was not error for the court to refuse to give instruction No. 3 requested by the United States Express Company. What we have said in our opinion in No. 22850 with reference to instruction No. 1 is applicable to this instruction; it does not fit the facts of this case. It would have been clearly erroneous to have instructed the jury that the plaintiff could not recover unless he could prove by the greater weight of the evidence that the driver of the wagon knew before the accident happened that plaintiff was on the sidewalk. In other words, the instruction makes the test of the driver's negligence whether or not he had knowledge that the plaintiff, on the sidewalk, might be injured. It is self-evident that the driver's knowledge of the position of pedestrians on the sidewalk could have no relation to his conduct in driving in front of the street car.

For the reasons above stated the judgment is affirmed.

AFFIRMED.

501 - 22935

BARBARA BONKOWSKY,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 573

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging a breach by defendant of its contract to transport her properly, in that it started its street car upon which she was a passenger while she was in the act of alighting therefrom. Upon trial she had a verdict and judgment for $3,500 from which defendant appeals.

As we have concluded that there must be another trial we shall only briefly refer to the testimony.

Plaintiff's story is that she was proceeding eastward on a 39th street car, and as it stopped on the west side of Grand boulevard she attempted to alight, when it started suddenly, throwing her to the ground. She is supported in this by the testimony of her daughter and one other witness. Opposed to this is the testimony of some four witnesses, to the effect that she attempted to alight after the car had started. It will be left to another jury to pass upon these variant stories.

It is argued with force that the verdict is excessive. In addition to the bruises on her head, plaintiff attempted to relate to the accident an impairment of her vision. We are inclined to the view that the greater weight of the evidence tends to show that this impaired vision is due

Def - 12930

SECURED JUDGMENT.

Plaintiff,

vs.

DEFENDANT, CITY BUILDING ASSOCIATION,

Defendant.

Plaintiff,

vs.

SECURED JUDGMENT.

Defendant.

2051A. 313

IN. APPEARANCE DOCKET

SATISFIED AND ENTERED OF RECORD.

to a condition which the doctors called nystagmus, which is almost always congenital. This is a condition where the eye constantly moves from one side to the other.

It is also very doubtful, to say the least, as to the sufficiency of the evidence to support plaintiff's claim that she is suffering from atrophy of the optic nerve. There was very persuasive evidence that no such condition existed. Upon the present record before us we should not be inclined to permit the judgment to stand for the reason that it manifestly is intended to compensate for injuries whose causal relation to the accident have not been sufficiently proven.

Errors sufficient to call for a reversal occurred with reference to the admission of testimony. One of the doctors was asked, "Have you an opinion as to what might produce or cause the condition that you found?" Objection to this was overruled, and the witness proceeded to give an answer which was clearly conjecture and speculation. That the admission of evidence of this nature constitutes prejudicial error calling for a reversal has been held in Lyons v. Chicago City Ry. Co., 258 Ill. 75, and cases therein cited. Dr. Converse was also permitted to state that plaintiff would eventually become blind, although how long thereafter he was unable to say. Similar testimony has been held erroneous as containing purely speculative opinion, in Lauth v. C. U. T. Co., 244 Ill. 244, and Kimbrough v. Chicago City Ry. Co., 272 Ill. 71.

The daughter of plaintiff was permitted to give her opinion that her mother could not see any more - "She cannot go outside any more without having some one with her." A motion to strike out these statements was overruled. This was erroneous, as manifestly the witness should not have been

permitted to relate subjective conditions to the jury. Shaughnessy v. Holt, 236 Ill. 485.

We are not satisfied to permit this judgment to stand. The question as to liability was very close, and a considerable portion of plaintiff's evidence as to the condition of her eyes was speculative and uncertain. In addition to this the rulings of the court upon the evidence as above indicated were erroneous. For the reasons suggested the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

523 - 22957

J. BORTUSKA,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

205 I.A. 574

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In a suit to recover damages for personal injuries plaintiff had a verdict and judgment of $4,300 from which defendant appeals.

We are of the opinion that plaintiff was guilty of contributory negligence in connection with the accident in question. The undisputed facts are that about five p. m. on July 4, 1911, plaintiff was driving a carriage easterly on Cornelia street in Chicago; as he came to Western avenue, a north and south street crossing Cornelia, he stopped for a southbound street car on the westerly tracks of Western avenue to pass; he then drove behind this southbound car onto the easterly tracks in front of an approaching northbound car, which struck his carriage, throwing him from his seat to the ground, with resulting injuries. The greater weight of the evidence shows that when plaintiff stopped to let the southbound car pass, his horses' heads were even with the westerly building line of Western avenue; that at this time he looked southward and saw the northbound car about a block away and moving; that this car came northward at a speed of about 8 or 9 miles an hour, the gong ringing, and passed the southbound car just as the latter was leaving Cornelia street;

that plaintiff, without giving further attention to the northbound car, started to drive behind the southbound car into the path of the other car; that the conductor of the southbound car and persons on the street shouted warnings to him, but he heeded them not and drove ahead in front of the northbound car which struck his carriage. This car was stopped within a few feet after the collision - the motorman says five feet.

Applicable to these facts is the language used by us in Sanderson v. Chicago City Ry. Co., No. 22437, opinion filed November 27, 1916, where upon consideration of a similar situation we said:

> "We have here the case of a driver of a wagon who knew that a car was approaching the point on the track at which he intended to cross, and that if he continued in this intention a collision was inevitable unless the car could be stopped in time. In the exercise of reasonable judgment the plaintiff knew or should have known that, as the northbound car wholly hid him for a time from the view of the motorman of the southbound car, to turn suddenly from behind the northbound car across the path of the other car would not allow sufficient time for the motorman to stop before colliding. Under such circumstances plaintiff should have ascertained the location and situation of the approaching car just before he attempted to drive across its path, and the failure to do this was negligence as a matter of fact."

We are also of the opinion that the facts in Ohnesorge v. Chicago City Ry. Co., 177 Ill. App. 134, affirmed 259 Ill. 424, are essentially like those in the instant case. In the Ohnesorge case the conduct of the plaintiff was held to be negligence. See, also, Roberts, Admr., v. Chicago City Ry. Co., 262 Ill. 228; Hack v. C. & I. T. Co., this court No. 22380, opinion filed October 30, 1916; Hedmark v. Chicago City Ry. Co., 192 Ill. App. 584.

As plaintiff was guilty of negligence which contributed to the accident he is barred from a recovery in this action. The judgment will therefore be reversed with a finding of fact.

REVERSED.

523 - 22957 FINDING OF FACT.

The court finds that the plaintiff was guilty of negligence directly contributing to the accident alleged in his declaration.

The owner finds that the journals was torn
of sufficient circulation to the national aligned
in the declaration.

527 - 22961

CATHERINE DORAN,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY (Impleaded with Ashland Auto Garage, a corporation),
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

205 I.A. 575

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was a passenger in an automobile belonging to the Ashland Auto Garage, one of the defendants, when it was struck by a street car belonging to the defendant Chicago Railways Company. She brought suit against both defendants for damages for the injuries thereby received, and upon trial had judgment for $3,000 from which the Chicago Railways Company appeals.

This accident has been heretofore under consideration by one of the branches of this court, in Ashland Auto Garage v. Chicago Railways Co., 183 Ill. App. 207, a suit brought by the owner of the automobile to recover from the street car company for the damages sustained by the automobile. It was there held, in an opinion by Mr. Justice Clark, that plaintiff could not recover, for the reasons that the evidence showed that the accident was caused by the negligent conduct of the driver of the automobile and "negligence on the part of the defendant was not established."

The present suit is brought by the passenger in the automobile, and while the negligent conduct of the driver, Disse, cannot be imputed to her, the greater weight of the evidence upon the record now before us, as upon the prior con-

sideration, proves that the sole cause of the accident was the careless and negligent conduct of Disco, the driver, and that the servants of the Chicago Railways Company operating the street car were not negligent.

The accident happened on Clark street, which runs north and south, in Chicago, in the block between Peterson avenue on the north and Ridge avenue on the south; this is a short block, approximately 300 feet long. On the evening of January 14, 1911, plaintiff, with her husband, had been dining in a restaurant located on the west side of Clark street about 125 feet north of Ridge avenue. After dining plaintiff entered the automobile driven by Disco, which was standing in front of the restaurant, and waited a few minutes for her husband. The decided weight of the evidence shows that the street car in question stopped at Peterson avenue for a passenger; that it proceeded southward at a speed of about 8 or 10 miles an hour; that the motorman at this time saw the automobile standing in front of the restaurant, and rang the gong as he came along; all the lights on the street car were going. When the front end of the street car was about 15 or 20 feet from the automobile the latter suddenly started from the curb diagonally across the track in the path of the oncoming car; it was the intention of the driver of the automobile to drive easterly into Ridge avenue. A witness, who stood on the front platform of the car, described the automobile as pulling right into the street car diagonally. As soon as the motorman saw the automobile start towards the track he applied the brakes and put on the sand, and the car went 30 or 35 feet after that. The front left wheel of the automobile struck the front step on the right side of the car, and the automobile then circled around in front of the car, running into a vacant lot on the other side.

We place no credence in Disco's testimony to the effect that he looked northward just before he started his machine and saw no street car. This was manifestly impossible, and, furthermore, we think his testimony in this respect was successfully impeached by showing that he had before that time testified that some two minutes elapsed between the time he looked northward and the time he started his automobile.

We are of the opinion that it is shown by the evidence that the accident happened because of the sudden and unexpected attempt of the driver of the automobile to cross in front of the moving street car when it was impossible by any means whatever for the motorman to bring the car to a stop in time to avoid a collision. With the gong ringing and the lights going on the street car, the motorman would have no reason in the exercise of due care to anticipate that when he was within a few feet of the automobile it would suddenly be driven in front of him. That he did all that he reasonably could do to bring his car to a stop as soon as he saw what the automobile was about to do is established beyond controversy. The accident was caused by no lack of carefulness in the operation of the street car, but solely because of the carelessness and negligence of the driver of the automobile.

Cases involving facts somewhat similar to these, in which it has been held there could be no recovery, are C. U. T. Co. v. Leach, 215 Ill. 184; Mack v. C. & I. T. Co., this court No. 22380, opinion filed October 30, 1916; Hedmark v. Chicago Rys. Co., 192 Ill. App. 584; Livingston Warehouse & Van Co. v. A. E. & C. R. R. Co., 170 Ill. App. 244; Bastien v. C. C. Ry. Co., 189 Ill. App. 367; Hauk v. Peoria Ry. Co., 154 Ill. App. 473. Many other cases might be cited.

Our conclusion is that the plaintiff has failed to prove the allegations of her declaration with reference to the negligence of the defendant, and the judgment is therefore reversed with a finding of fact.

REVERSED.

827 - 22961

FINDING OF FACT.

The court finds that the accident in question was not caused by the negligence of the defendant as alleged in plaintiff's declaration, or either count thereof, but that it was caused solely by the negligent conduct of the driver of the automobile belonging to the corporation Ashland Auto Garage.

530 - 22964

EDWARD ATLAS, minor, by
Samuel Atlas, next friend,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

205 I.A. 576

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Edward Atlas, plaintiff, a lad nearly eight years of age, was struck by one of the street cars belonging to the defendant and injured. He brought suit in an action in tort of the 4th class, and upon trial had a verdict and judgment for $554. Defendant asks that the judgment be reversed.

Plaintiff's statement of claim fills nearly six pages of the abstract; it is far from being "a brief statement of the nature of the tort," contemplated by the statute. Most of the matter contained in this statement is argumentative and descriptive. Defendant argues that even with this prolixity it does not state a cause of action, and there is force in some of the criticisms made against it. However, in view of the conclusion we have reached in regard to this case, the sufficiency of the statement of claim is not important.

We have concluded that this case must be reversed for the reason that the plaintiff failed to prove that the accident was caused by the negligent conduct of the defendant.

There seems to have been some uncertainty as to the exact date of the occurrence, some witnesses fixing it as November 17, 1914, others November 18th. Examination of the testimony, however, shows beyond any doubt that all the wit-

nesses were testifying to the same occurrence, so that the uncertainty as to the date is of no importance.

The accident happened on North Ashland avenue, in Chicago, a street running north and south, and nearly in the middle of the block between Augusta and Emma streets. The boy had been to school, which was on the west side of North Ashland, and, when school was dismissed, with other children he crossed to the east side of the street and later undertook to return to the west side, when he was struck by a southbound car belonging to the defendant and knocked back towards the east and was then run over by a northbound wagon. It is undisputed by the evidence that as the car was going southward in the middle of the block the plaintiff ran west suddenly from between two northbound wagons; that the first of these two wagons entirely hid the boy from the motorman and those on the platform, and that he was not seen until he stepped on the track about 5 or 6 feet from the front end of the car; that immediately the motorman put on the brakes and sand and brought the car to a stop within 15 or 20 feet. The evidence varies as to the speed, but the greater weight of the evidence tends to prove that the car was going 5 or 6 miles an hour. The conclusion is inevitable from the evidence that the motorman was running his car at a moderate rate of speed, and that as soon as the boy appeared unexpectedly from behind the wagon every possible effort was made to stop the car. We are of the opinion that the exact speed of the car is not important, for when the boy first appeared in front of the car he was so near to it that it would have been impossible to stop the car before striking him, no matter at what speed it was going.

The rule is that in such a case plaintiff must show that the circumstances were such that the servants of the defendant had an opportunity to become conscious of the facts

giving rise to the duty and a reasonable opportunity to perform it. See W. C. Street Ry. Co. v. Schwartz, 93 Ill. App. 387; C. U. T. Co. v. Browdy, 206 Ill. 615; the recent case of Trafelet v. C. C. Ry. Co., opinion by this court, No. 22392, filed November 27, 1916; also Hack v. C. C. Ry. Co., 69 Ill. App. 656, affirmed in 173 Ill. 289. These and many other cases establish the rule that under circumstances where a pedestrian unexpectedly appears upon a street car track in front of an approaching car, the motorman is obligated to do all that he reasonably can to avoid the accident, and if he does this it cannot be said that the accident was caused by any negligence on his part. That is the situation in the instant case, and as plaintiff has failed to establish the negligence of the defendant, and the evidence shows that the accident was not caused through any fault of defendant's servants operating the car, the judgment must be reversed with a finding of fact.

REVERSED.

530 - 22964

FINDING OF FACT.

The court finds that the defendant was guilty of no negligence in the operation and management of its car which caused the accident to plaintiff alleged in his declaration.

519 - 22953

~~ERMINA~~ VICTORIA EHRENSTROM,
Administratrix, etc.,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

205 I.A. 583

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for negligently causing the death of plaintiff's intestate; on a trial before court and jury there was a verdict and judgment for $8,000, and defendant appeals.

It is assigned for error and argued that the verdict is contrary to the manifest weight of the evidence, that plaintiff's intestate was guilty of negligence to which must be ascribed the proximate cause of the fatality, and that several of the instructions are reversibly erroneous. We think all of these contentions are well taken and that the judgment is clearly erroneous. However, as the basic principle for a recovery in cases of the nature of the one before us is that the injured person must be in the exercise of due care for his own safety at the time the injuries for which a recovery is sought were sustained, and that such person must not have been guilty of negligence contributing to such injuries, the whole case is disposed of regardless of the accuracy or inaccuracy of the court's instructions to the jury.

On Sunday evening, August 10, 1913, at about nine o'clock, plaintiff's intestate was struck and fatally injured by a westbound car of defendant on Sixty-third street at the intersection of Morgan street. Deceased at about seven o'clock and again at half past eight o'clock

2052 1/2 E83

that evening had telephoned to his wife at his home, 3343 Potomac avenue, west of Humboldt Park. At about eleven o'clock that night she saw him in the Englewood Hospital suffering from injuries inflicted when he was run over by defendant's car. What the deceased was intending to do at the time he was injured is a matter of conjecture. There is no direct evidence upon the subject. Deceased died five days after the accident while his limb was being amputated and without, so far as the record shows, having related to anyone the circumstances of the accident.

At the time of the accident deceased was alone, no friend or member of his family being with him. The proof is silent as to what he had been doing previous to the accident or where he had been visiting, if anywhere, except that one of plaintiff's witnesses on cross-examination testified that there was a saloon on the corner and that she saw deceased step from the platform leading to the door of this saloon just before the accident. Deceased stepped into the track of the car, when it was going along at a good speed, within six or eight feet from where it struck him. He was going in a southwesterly direction and it appears that he stepped in front of the car with his eyes turned away from it. There is no evidence that he looked for the approaching car. If he had looked for it he must have seen it, as it was electrically lighted and had a headlight in going order on the west end of the car. It seems that an eastbound car was either approaching Morgan street from the west or had come to a stop at the west crossing of Morgan street in the usual way. Whatever may be the fact as to the position of the eastbound car not being very material except that it is argued for plaintiff that deceased's at-

tention was distracted from the westbound car and fixed upon the eastbound car and that such condition excuses deceased's negligence in getting into the path of the westbound car; still it is too clear for dispute that deceased did not look for the approaching westbound car, and this is sought to be justified upon the theory that the remote danger was monopolizing the attention of deceased to the exclusion of the danger which was so imminent. While it is in evidence that deceased in his haste brushed against a pedestrian, still, there is no evidence that there was any obstruction to the view which interfered with deceased's seeing the approaching car in time to avoid being injured by it. One of plaintiff's witnesses testified that the street was "quite deserted" at the time. There is no cause or reason shown by the evidence or from any circumstances touching the occurrence to excuse deceased for recklessly plunging in front of the car, as he did, without looking for the moving car or using any foresight or care. While to step into the path of a moving car is not per se negligence, still it becomes negligence in fact unless some good reason appears to excuse. Burke v. C. C. Ry. Co., 153 Ill. App. 386; Cotter v. Same, 141 ibid.101.

Plaintiff's counsel in their brief say: "It is conceded by us as well as by appellant that the motorman applied the brakes and made every effort to stop the car on discovering Ehrenstrom's danger, but at the rate of speed at which the car was going, this was a physical impossibility." This relieves defendant from any implication of having wilfully injured the deceased. The evidence demonstrates that the gong was being sounded at the time the car approached the Morgan street crossing and that the speed of the car was not

excessive. The car was stopped within its own length, the deceased not being seen by the motorman until a moment before the impact, making it impossible to stop sooner after discovering the peril in which deceased had thoughtlessly placed himself. The declaration under which the cause was tried contained the essential averment that deceased was at the time of his injury in the exercise of ordinary care for his own safety. This averment it was necessary to prove by the greater weight of the evidence. No such proof is in the record. Such proof cannot be dispensed with. In the circumstances of this case and on the whole case made by the record, it becomes our duty to reverse the judgment of the trial court with a finding of fact, our duty in this regard not being confined to cases in which the trial court might properly direct a verdict; for, as said in Borg v. Chicago, R. I. & P. Ry. Co., 162 Ill. 348 -

> "It is plain that the statute does not refer to such questions, but is designed to confer upon the Appellate Court more extended powers than are possessed by the judge of the trial court, and to give to the former court the power, upon a consideration of the facts, to find them different from the finding of the court from which the cause is brought, provided it shall recite in its final order, judgment or decree the facts so found."

However, as in Roberts v. C. C. Ry. Co., 262 Ill. 328, this is a case where defendant's motion to instruct a verdict in its favor should have been granted on the ground that there was no proof that deceased was in the exercise of due care for his own safety at the time of the accident, but that on the contrary the evidence proved the fact that deceased was guilty of contributory negligence which was the proximate cause of his injuries.

The judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

519 - 22953 FINDING OF FACT.

The court finds as the ultimate facts that plaintiff's intestate was not in the exercise of ordinary care for his own safety at the time of the accident alleged in the declaration, but was on the contrary guilty of contributory negligence which was the proximate cause of the accident and his resulting injuries.

3026

2 - 21766

C. E. MALM and L. M. MALM,
Defendants in Error,

vs.

HARRY I. SCHWIMMER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 584

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse an order denying plaintiff in error's motion to set aside a judgment entered by confession on a lease and to permit him to file his appearance and defend the cause on its merits. It appears from his affidavit in support of the motion that he had no notice of the judgment until served with an execution; that there was no consideration of the lease on which the judgment was taken; that plaintiffs never delivered possession of the premises mentioned in the lease; that defendant never paid any rent therefor nor occupied the premises, and that while he negotiated with plaintiffs for rental of the premises the lease was not to become effective until plaintiffs decorated the premises which was not done, but which they refused to do, and that there was no delivery of the lease by plaintiffs to the defendant. The purport of the facts thus set forth is that it was the intention of the parties that the lease was not to take effect at once upon its delivery but that the delivery was conditional upon something to be done by the lessors before it should take effect. Hence the affidavit tended to show a good defense which the court in the exercise

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6. M. Hall and C. B. Mills,
Defendants in error,

vs.

Plaintiff in error.

MR. PRESIDING JUSTICE BROWN

of equitable jurisdiction over judgments entered by confession upon a power of attorney and cognovit should, in our opinion, have permitted defendant to present. Authorities permitting the reopening of judgments by confession under such circumstances are so familiar as not to need citation.

REVERSED AND REMANDED.

365 - 22330

MARY HELD,
Appellee,

vs.

BANKERS INSURANCE CORPORATION,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 585

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee is the widow of one Isaac Held, to whom a benefit certificate was issued by the Bankers Union of the World, a Nebraska society. She brought suit against appellant, an Illinois fraternal beneficiary society, alleging the issuance of such certificate in 1901; that in 1906 a corporation styled Bankers Union "took over" the business of the Bankers Union of the World, and assumed said certificate; that in 1912 the Bankers Union "consolidated" with Coin Exchange Insurance Co. of Chicago, a fraternal beneficiary society incorporated under the laws of the State of Illinois; that said Coin Exchange Insurance Co. in the year 1913 changed its name to "Bankers Insurance Corporation", and that said Held in his lifetime complied with all the terms and conditions of his contract and paid all the assessments, dues, premiums and fees charged against him or payable by him to, and the same were accepted by the several corporations in turn from the issuance of said certificate to the date of his death. The amount for which the certificate was issued was $3,000. Defendant averred in its affidavit of merits that under the terms of said benefit certificate issued by

the Bankers Union of the World and its constitution and by-laws made a part thereof, plaintiff would be entitled to recover from the Bankers Union of the World only $904.94, and that it had tendered that amount to plaintiff before the commencement of the suit, but plaintiff had refused to accept the settlement in full satisfaction of her claim. Upon such averment the court entered judgment for that sum and costs, which it appears from the record has since been paid, and thereupon the cause proceeded to trial upon issues raised by additional averments in the affidavit of merits to the effect, first, that defendant had no power, right or authority to enter into a contract to pay benefits stipulated by another society or corporation, and second that said Isaac Held made no application for membership in defendant's society and did not submit to or undergo a medical examination for membership as required by the Illinois statute.

To support her cause of action plaintiff made proof of the issuance of such certificate, of the payment of the assessments, dues, etc., as alleged, including those made to and accepted by appellant, and of submission to appellant of proofs of death etc., and that there had been a "consolidation" of said Bankers Union and said Coin Exchange Insurance Company, and a change of name from the latter to that by which appellant was sued.

At the close of such proof defendant made a motion for an instructed verdict, which was refused. Thereupon defendant proved its incorporation in Illinois as a fraternal beneficiary society by the name American Fraternal Society, and successive changes of name to Coin Exchange Insurance Company and Bankers Insurance Corporation, also that the Bankers Union was an Illinois beneficiary society, and that

a search among the records of the Coin Exchange Insurance Company and files failed to show any application for membership therein by Isaac Held or that he ever submitted to a medical examination. At the close of all the evidence the court denied a motion of defendant for an instructed verdict, and, stating that there was no dispute of facts in the case, simply a question of law, directed a verdict for plaintiff for $2,164.16. Judgment was entered thereon from which this appeal is taken.

Two issues were thus presented: First, the authority of appellant to assume the certificate of the Nebraska corporation; and, second, whether the deceased had made an application and been examined for membership in the appellant society.

The contention is made by appellee that as the court's certificate to the bill of exceptions does not state that it contains all the evidence we must assume sufficient evidence was heard to support the verdict. But, even though other evidence was heard, the court could not properly direct a verdict in view of the fact that the record contains some evidence tending to show a failure of deceased to make an application and submit to an examination for membership in the defendant society and, therefore, tending to support one of the defenses. Then, too, the evidence pertaining to the alleged assumption by appellant of the policy sued on is too meager to enable us to say either that it did not exceed its powers, or that a new application and examination could be dispensed with.

As stated in her pleading plaintiff's cause of action was predicated upon appellant's assumption of such certificate. No formal contract of assumption was introduced. Plaintiff relied mainly on appellant's exercise of such a

power by accepting assessments and dues from deceased and, what was a mere conclusion of a witness that, there was a "consolidation" of some sort between the Bankers Union and the Coin Exchange Insurance Company. By what arrangement or in what manner one corporation undertook to take over the membership of another and assume its obligations is in no way disclosed by the record.

We held in Alexander v. Bankers Union of Chicago, 187 Ill. App. 469, that a reinsurance contract whereby one fraternal beneficiary society undertook to assume and agreed to pay the benefits stipulated in the certificate of another, was ultra vires the society and could not be enforced, and we distinguished that case from Williams v. Bankers Union of Chicago, 166 id. 495, relied upon by appellee, in that the plea of ultra vires was withdrawn in the latter case. In view of the opinion in the Alexander case, (from which we find no good reason to depart) it is at least doubtful whether plaintiff's statement of claim states a cause of action, predicated as it is upon the right of a fraternal beneficiary society of Illinois to assume the obligations of a similar society. Even though it is not certified that the bill of exceptions contains all the evidence yet, whatever the evidence, the court was not justified in directing a verdict contrary to law.

The statement of claim may possibly be amended so as to state a cause of action against appellant. Otherwise a gross fraud would appear to have been perpetrated. If appellant has undertaken to assume without authority the obligations of another fraternal society to its members and has continued to receive their money on the theory of a valid exercise of such power but with the intention later of repudiating the assumed obligation, (as cited cases

show was done with other members of the Bankers Union of the World) then its right to continue business under an Illinois license ought to be called to the attention of proper State authorities.

While we think it was error to direct a verdict in this case and doubt whether the action in its present form can be maintained, we feel that an opportunity should be given for a new trial if on the facts the pleadings can be amended so as to present a cause of action and prevent the consummation of what from the record before us appears to be an unconscionable fraud.

REVERSED AND REMANDED.

382 - 22337

MICHAEL BOTTIGLIERO and
MARY BOTTIGLIERO,
Appellees,

vs.

MORRIS ZEIDMAN and MINNIE
ZEIDMAN,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 587

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree rendered after a hearing before the chancellor on the issues raised by appellees' bill of complaint, appellants' answer thereto, appellants' cross bill and appellees' answer thereto. The decree dismissed the cross bill for want of equity and granted the relief prayed for in the bill, which sought the reformation of a written contract for the exchange of land and damages for appellants' failure to carry out their part of it after appellees' tender of performance. The bill alleged, and the decree found, that there was a mutual mistake in designating the number of the street on which appellees' property was located and that complainants suffered damages from the breach of contract to the amount of $787.50 exclusive of solicitors' fees and expenses incurred in the suit. The decree further ordered the cancellation of a judgment note for $1,000 signed by complainants, and that a judgment note for the same amount signed by defendants should be surrendered on payment of said damages, each of said notes having been given by the

1924 - 2837

MICHAEL DOLLIVER MAY
Mary DOLLIVER,
Appellees,

vs.

MICHAEL DOLLIVER and MARY
DOLLIVER,
Appellants.

APPEAL FROM
BUREAU COUNTY.
HON. [illegible]

MR. PRESIDING JUSTICE BAKER

DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree rendered after a hearing before the chancellor on the issues raised by appellees' bill of complaint, appellants' answer thereto, appellants' cross bill and appellees' answer thereto. The decree dismissed the cross bill for want of equity and granted the relief prayed for in the bill, which sought the reformation of a written contract for the exchange of land and damages for appellants' failure to carry out their part of it after appellees' tender of performance. The bill alleged, and the decree found, that there was a mutual mistake in overstating the number of the street on which appellees' property was located and that complainants suffered damages from the breach of contract to the amount of $187.50 exclusive of solicitors' fees and expenses incurred in the suit. The decree further ordered the consolidation of a judgment note for $1,100 signed by complainants, and that a judgment note for the same amount signed by defendants should be surrendered on payment of

respective parties to secure the performance of their part of the contract and held by a third party.

Appellants' cross bill claimed a breach of the contract by appellees and an offer and readiness of performance on their part, and, except as to reformation of the agreement, sought the same relief against appellees as prayed for by the latter against them, namely, damages for breach thereof and cancellation of their judgment note. In view of appellants' position and that they did not point out in any manner in the court below an objection to complainants' right to equitable relief, they will be regarded as having waived the contention made here that complainants' had an adequate remedy at law. (Law v. Ware, 239 Ill. 360.) While, however, they concede that a reformation of the contract on the ground of mutual mistake is a matter of equitable jurisdiction and that when jurisdiction is assumed for that purpose the court may properly retain it for all purposes including the assessment of damages, (Keith v. Hinckleman, 173 id. 137) they contend reformation of the contract was a mere subterfuge for acquiring such jurisdiction. That, of course, depended on whether there was a mutual mistake as alleged. If the court properly found there was, thus giving ground for equitable intervention, then there is no room for appellants' contention that the court did not also have jurisdiction to assess damages.

Much of appellants' argument is devoted to a discussion of questions of fact and the insufficiency of the evidence to warrant the chancellor's findings. Of course, unless the findings of fact are clearly and palpably wrong the decree as to them should not be disturbed. (Preston v. Lloyd, 269 Ill. 152.) But we are not able to say even from the evidence preserved that they are, and, as it is

stated in the court's certificate that all of the evidence heard was not preserved, it will be presumed that there was sufficient evidence to support the specific findings of fact recited in the decree.(Allen v. Henn, 187 id. 486; Kennard v. Curran, 239 id. 122.) Hence, assignments of error relating to the sufficiency of evidence to sustain the chancellor's findings, as well as to numerous points that depend upon the complete evidence, among them that the evidence does not show a tender of performance by appellees nor their readiness and willingness to perform, that they made performance on their part impossible, that the decree is against the evidence, and that the proof does not support the amount of damages assessed, are not open on this state of the record for our consideration. In such a state of the record we cannot undertake to consider points based on appellants' hypotheses of the facts different from what the chancellor found them to be.

Besides, the express admission by appellants' counsel at the hearing of all the allegations in the bill except those relating to a mutual mistake, by reason of which the court expressly directed that the evidence should be confined to the one issue whether there was a mutual mistake, obviated the necessity of proving such other allegations and estops appellants from questioning the sufficiency of proof relating thereto. (Allen v. U. S. Fidelity Co., 269 id. 234; Preston v. Davis, 112 Ill. App. 636.)

As to appellants' claim of a variance, first urged in a petition for rehearing and not during the trial, it comes too late for our consideration. (Holman v. Gill, 107 Ill. 467; Fox v. Starr, 106 Ill. App. 273.) Besides, if the entire proof were before us no variance might appear. Nor can appellants properly urge a failure to prove allegations expressly admitted. It is unnecessary to add that findings

stated in the court's certificate that all of the evidence heard was not preserved, it will be presumed that there was sufficient evidence to support the specific findings of fact recited in the decree. (Allen v. Allen, 187 Id. 484; Kennedy v. Turner, 218 Id. 128.) Hence, assignments of error relating to the sufficiency of evidence to sustain the chancellor's findings, as well as to numerous points that depend upon the complete evidence, among them that the evidence does not show a course of performance by appellees nor their reliance and willingness to perform, that they made permanent improvements on their part in reliance upon the decree is against the evidence, and that the proof does not support the amount of damages assessed, are not open on this state of the record for consideration. In such a state of the record we cannot undertake to consider points based on appellants' objections of the facts different from what the chancellor found them to be.

Besides, the express admission by appellants' counsel at the hearing of all the allegations in the bill except those relative to a mutual mistake, by reason of which the court one terms whether there was a mutual mistake, obviated the necessity of proving each other allegations and estops appellants from questioning the sufficiency of proof relating thereto. (Allen v. E. F. Fidelity Co., 240 Id. 334; Kinnison v. Davis, 11 Ida 111. 449, 830.)

As to appellants' claim of a variance, first raised in a petition for rehearing and not during the trial, it comes too late for our consideration. (Paisley v. Hill, 247 Ill. 464; Kelly v. Kelly, 104 Ill. App. 173.) Besides, if the entire proof were before us no variance might appear. Nor can objections properly make a failure to prove allegations expressly admitted. It is unnecessary to say that findings

of fact in the decree can not be impeached unless all the evidence heard on the trial is preserved in the record. (Kennard v. Curran, supra; City v. Noyes, 218 id. 594.)

It is complained that it was improper to allow solicitors' fees. The decree states that the damages assessed are exclusive of them. The record, however, shows that counsel for appellants expressly stated that he had no objection to a draft of the decree which included them. Hence, if they were actually included as part of the damages he cannot urge as error what he expressly assented to. Otherwise the damages appear to have been assessed in conformity with the recognized rule for the measure of damages, the difference between the agreed price of the properties exchanged and their market value at the time of the breach of the contract. Whether the amount assessed was correct cannot be told in the absence of a complete record of the evidence.

We think there was no abuse of the court's discretion in refusing to grant a rehearing, and that the state of the record requires us to affirm the decree.

Appellants did not submit a sufficiently full and fair abstract for a proper consideration of all the points urged; and the additional abstract filed by appellants is unnecessarily full. Ten pages thereof will be taxed against appellants as additional costs.

AFFIRMED.

408 - 22361

JOSEPH J. SULLIVAN,
Appellee,

vs.

THE A. H. ANDREWS COMPANY, a corporation,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

205 I.A. 590

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit against appellant to recover a commission of 50 cents per chair on a sale of 750 chairs for appellant to one von Moeteren to be installed in a theatre.

The main controversy was over the terms of the contract for a commission, which was oral and made between appellee and one Kenfield, appellant's city sales agent. Appellee's version of the agreement was that he was to have any excess of the sale over the catalogue price, and Kenfield's version was that sales were to be "f. o. b. factory", meaning delivered at the factory on cars, and that the catalogue price was to be net to appellant and did not include installation, the cost of which varied with conditions. It was testified that the cost of installation in this instance, being upon an inclined cement floor, was the difference between the catalogue price of $1.25 and the sale price of $1.85 per chair, the amount of the commission claimed.

The burden of proof rested upon appellee to prove the contract under which he claimed the right to recover, as to the terms of which the only two persons having knowledge

of it materially differ. The fact that the cost of installation would naturally vary with circumstances gives color to appellant's version. It is at least doubtful whether there was a meeting of minds as to the terms of the contract and whether it can be said there was a prepond rance of evidence in favor of appellee's version thereof, the two witnesses being apparently of equal credibility. (Broughton v. Smart, 59 Ill. 440.)

While it was a question for the jury to decide yet in such a doubtful case the trial should have been fairly conducted. Appellant complains, and we think with much reason, that appellee's counsel persistently endeavored, in the face of adverse rulings of the court, to bring prejudicial matters before the jury both in his examination of witnesses and argument to the jury. We shall not review the numerous instances complained of. It is sufficient to say that they do not meet with our approbation, and in view of the doubt whether there was a meeting of minds as to the terms of the contract and the direct conflict of evidence thereon between the only two persons who had personal knowledge thereof, and the consequent questionable preponderance of evidence, we think that the prejudicial matters aforesaid might well account for the jury's verdict and, hence, that the judgment entered thereon should be reversed and the cause remanded for a trial that will be free from conduct which courts of review have frequently recognized as ground for reversal.

REVERSED AND REMANDED.

44 - 22369

MINNIE MILLER,
Defendant in Error,

vs.

I. LERNER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 591

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Miller brought suit against Lerner, claiming the latter rented from her an apartment for the period commencing September 1, 1914, and ending August 31, 1915, at the rate of $36 per month and had not paid rent after April 30, 1915. Lerner, prior to September 1st occupied the premises under a lease fixing the rent as $34 per month and claimed that thereafter he occupied the premises from month to month on an oral arrangement to pay $36 per month, and that he vacated the premises April 30, 1915 after giving 30 days notice and paying rent at that rate up to that time.

Both parties claim that occupancy of the premises after September 1, 1914 was under a new arrangement and that a written lease for the period from September 1, 1914, to August 31, 1915 was drawn but that defendant refused to sign it because it had no "steam heat clause" in it. Plaintiff, however, testified that subsequently he presented defendant with a new lease containing such clause and that he retained it without objection, which defendant did not deny. As defendant continued in the premises after that time, paying the rent provided for in the new lease without objecting to its terms we think he is in no position to claim that the

lease, whether oral or written, was from month to month, and that the court properly found that the parties agreed upon a term expiring August 31, 1915, and that defendant was liable for the unpaid rent up to that time. The judgment will be affirmed.

AFFIRMED.

time, despite duty or action, was from moving to music.
and yet the music harmonized from the greatest distance
with a fine objective unless it fits, and that difficult
was itself the music does do to that time, This fundamental
need will be efficient.

CONCLUSION.

423 - 22378

GEORGE RYAN,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 592

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee was driving a team south on a north and south street and was run into at its intersection with an east and west street by one of appellant's west bound electric cars running on the latter street, causing him to be thrown from the wagon and to receive the injuries complained of in his declaration, charging general negligence, excessive speed and failure to give a warning of the approach of the car. This appeal is from a judgment entered on the verdict for $3,000.

While we think the case was properly submitted to the jury we also think that the verdict was clearly excessive and that an instruction on damages constituted prejudicial error.

There was no proof of any permanent injury except possible difficulty in breathing through one nostril, as to which the evidence was uncertain and doubtful. Appellant said his nose was "broken so that you could not breathe through it on one side." Whether the ability to breathe was a condition just after the accident or at the time of the trial, there is nothing in the record to indicate. The only other testimony relating thereto was that of his

doctor who was unable to say from an examination made about three weeks after the accident whether the nose had ever been broken, but he found that the membrane in the nostril passages was still swollen at that time. No other testimony on this subject was offered. Aside from such condition, whatever it was, and a broken tooth, the injuries complained of were of a temporary nature consisting of superficial cuts and bruises all of which healed up within about two weeks, two of the cuts requiring one stitch each. For such injuries the amount of the verdict and judgment was excessive.

The instruction relating to what was proper for the jury to consider in estimating plaintiff's damages authorized them to consider "the effect, if any, shown by the evidence of the injury upon the plaintiff's * * * ability to labor" and stated that "in the assessment the jury must take into consideration only such elements of damage as have been alleged in the declaration and which have been established by a preponderance of the evidence."

It was alleged in the declaration "that by reason of which injuries he had been prevented from performing his usual work and business * * * and in future will continue to be unfit and unable to perform his usual work and business"; and also that he paid and became liable to pay large sums of money for medical attention, nursing, care and medicine. There was evidence that he was confined to the hospital for a time and received medical attention, and evidence tending to show that he was out of work for at least six or eight weeks. There was no evidence as to his earning capacity or the wages he received, or medical or hospital expenses. Whether the jury undertook under the instruction to speculate upon these elements of damage claimed in the declaration and shown to exist, but without any evidence by which to

measure the amount of damages, can only be surmised by the amount of the verdict. That plaintiff lost some time and incurred some expenses were facts before the jury, which were open to the jury's consideration under said instruction, but as to which there was no evidence by which the jury could estimate his damages. Cases somewhat in point on this question are Harley v. A. H. & C. Railway Co., 149 Ill. App. 339; Krakowski v. A. H. & C. R. R. Co., 167 id. 469; Lyman v. C. C. Ry. Co., 176 id. 27; Hatcher v. Quincy H. R. & C. Co., 181 id. 30. When we take into consideration the size of the verdict and the only evidence that furnished a legitimate basis for an award of damages and the instruction aforesaid we think the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

because the amount of damages, can only be ascertained by the amount of the verdict. That plaintiff lost some time and incurred some expenses were facts before the jury, which were open to the jury's examination under said instruction, but as to which there was no evidence by which the jury could estimate his damages. Cases somewhat in point on this question are Murphy v. C. B. & Q. Railway Co., 118 Ill. App. 249; Kirkpatrick v. C. & I. C. Co., 142 Id. 327; Heimker v. Quinsey H. & C. Co., 147 Id. 49. When we take into consideration the size of the verdict and the only evidence that furnished a basis for an award of damages and the instruction aforesaid we think the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

432 - 22387

MARY ROBERTS,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 594

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant asks for a reversal of a judgment of $2,000 recovered against it for personal injuries received by appellee while a passenger on one of its cars, on these grounds: (1) that the verdict is against the weight of the evidence; (2) that error was committed in refusing proper instructions, and (3) that the verdict is excessive.

The car in question was going east and plaintiff boarded it a block west of the place of the accident, which was at the junction of a north and south street where, because of "a jog in the street", the street car track curved to the north and then turned due east. The car was crowded with passengers inside and on its platforms. Plaintiff boarded the rear platform and stood just inside the step leading onto it. As the car reached the curve she fell or was thrown off the car. The negligence alleged in the respective counts of the declaration was (1) in running and operating the car at and upon the curve at a high, rapid and excessive rate of speed, (2) in failing to warn plaintiff of the approach of the car to the curve, (3) in permitting the platform to be overcrowded so plaintiff could not proceed to the inside of the car before reaching the

curve, and (4) in failing to give plaintiff sufficient time to get onto the platform away from the step and to proceed into the car before the curve was reached.

The error claimed as to instructions was in refusing to direct a verdict for defendant on the last three counts. Even though the evidence did not tend to sustain these counts it was not error to refuse to instruct the jury to disregard them if the proof sustained the first count. (Heidenreich v. Bremer, 260 Ill. 439.) While it must be conceded that the record presents a close case as to that count we are not prepared to say that there was not sufficient evidence to sustain it.

The two main controverted questions of fact were whether the speed of the car at the point of the accident was excessive, and whether plaintiff under the circumstances exercised ordinary care for her own safety. The evidence bearing on both points is conflicting and presented a case peculiarly within the province of the jury to decide, and it is not for this court to disturb the verdict of the jury on controverted questions of fact in the absence of any reversible error unless this court can say after a careful analysis of the evidence that the jury's conclusion is manifestly against the preponderance of the evidence. There is no definite rule for such determination. As often said the number of witnesses testifying one way or the other is not absolutely controlling. Frequently the decisive factor is the credibility of the witnesses, which, as often ... stated, the jury is in a better position than we to determine. Much of appellant's criticism is directed to the credibility of appellee and her witnesses and the improbability of much of their testimony, but they were not successfully impeached nor is their testimony inherently improbable.

The question whether plaintiff was exercising due care rests mainly on whether she took the precaution to take hold of something while standing in a place of some danger. She said she did. The conductor said she did not. The testimony of another witness for her on the subject was contradictory. Excluding his testimony we can not say that there was not a preponderance of evidence in her favor simply because the conductor denied that she had hold of anything or because she was manifestly mistaken as to what she had hold of with her left hand. If the jury believed her testimony that she had hold of the horizontal bar or rail in front of the conductor with her right hand we can not say that it was not sufficient evidence of the exercise of ordinary care on her part under the circumstances. The jury may have been justified in questioning whether under the circumstances the conductor was so keenly observant as to notice such a detail.

On the question of speed there was as usual a wide divergence of opinion, plaintiff and one of her witnesses expressing one opinion, and the motorman, conductor and one of defendant's witnesses, another. Plaintiff's witness also testified that as the car reached the curve he too was thrown from his standing position toward the door of the car. This was a circumstance tending to show excessive speed, in view of the character of the curve described. The jury hearing and seeing him was better able to determine the credibility of his testimony on the several matters criticised by appellant than we are, and it is undisputed that plaintiff fell or was thrown from the car when it reached the curve. It was peculiarly a question of fact for the jury to determine, under the conflict of evidence as to her having hold of the rail referred to and as to the speed of the car, whether or not plaintiff was exercising ordinary care for her own safety and the speed was

excessive under the circumstances. The test is not whether by a nice balancing of circumstantial facts, the interest of witnesses, their credibility as it appears to us, and the probabilities as we see them, we would have decided the case the other way but whether we can say that the verdict was manifestly against the weight of the evidence, considering the opportunities of the jury both to see and hear the witnesses. After carefully weighing the evidence we can not reach that conclusion.

The physical injuries testified to consisted mainly of bruises on various parts of the body, a cut over the right eye requiring six stitches, and one on her chin on which one stitch was taken, an injury to the right arm and knee, a chip off a tooth and pains in various parts of the body. There were no broken bones and apparently no permanent injuries except the scars, which were not described as serious. It was also shown that a threatened abortion was averted by the doctor's care, but it appears that the birth and child were normal. Plaintiff was confined to her bed and under medical attendance for about five or six weeks, when she was able to resume work.

Appellant argues that plaintiff alone testified to some of the most serious injuries, and that they were not alluded to by her other witnesses, who would likely have mentioned them if they existed or were not magnified, and that she probably did not underestimate their character. In that connection it is also pointed out that plaintiff endeavored to enhance her damages by false testimony with reference to the value and loss of her services. We are not favorably impressed with her testimony on that subject nor the motive that inspired it. We think her testimony to the effect that she had been steadily employed for over two and

one half years prior to the accident as a cashier in a barber shop at the LaSalle Hotel was clearly refuted and that she merely occupied the position of a substitute for a few weeks at a time and was not otherwise regularly employed, and did not lose her job by reason of the accident. If the jury gave credence to her testimony on that subject and allowed her damages for loss of position and earnings at the rate testified to, of $85 per week, they allowed her, in our judgment, about $500 too much. And in view of her testimony on that subject, and its natural effect to impair the value of her testimony where not corroborated as to the extent of her injuries, and the unsatisfactory evidence as to any serious continuing results from her injuries, we think there should be a remittitur of $500. If that is made within ten days the judgment will be affirmed, the costs in this court to be divided equally, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON A REMITTITUR.

3033

444 - 22399

EDNA ANDERSON,
Appellee,

vs.

E. STANTON ANDERSON,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 595

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order committing appellant for contempt of court for refusing to pay alimony entered in a suit for divorce brought by appellee against appellant. The record shows a rule on appellant to show cause why he should not be punished for failure to pay alimony as ordered, and that on the return day he was brought before the court by a writ of attachment on his failure to appear after notice of the rule. The record further shows a motion to quash the attachment for various reasons, among which were that only four days previous to the entry of said rule he was discharged from a like rule on his answer thereto, and that no new matter had been shown why any further rule XXXXXXXX was necessary; and also that no showing had been made for a rule or attachment. The record fails to show any petition or affidavit, as is the usual practice in remedial contempts like the one in question, (Oster v. The People, 192 Ill. 473; 4 Ency. of Pl. & Pr. 776-779) to support either the rule or attachment. If, however, defendant was given an opportunity to appear and purge himself of contempt, and evidence was heard to support the findings recited in the

3139

2053 A. 395

court's order of commitment we should deem it unnecessary to reverse because of such irregularities. But the record shows nothing upon which to predicate the order of commitment except a rule, unsupported by any petition or affidavit of facts, the service thereof, the appearance of respondent under attachment, and an undisposed of motion to quash the same.

The order appealed from commits appellant to the county jail for the non-payment of $1,075 for the use of complainant. It does not recite that the court heard any evidence. If it did we would presume in the absence of a certificate of evidence that the evidence heard was sufficient to support the findings. But in the face of this record showing that appellant was discharged on his answer to the previous rule, which set up facts tending to show that no alimony was due at that time, we can not indulge the presumption that the court heard evidence that showed over $1,000 due as alimony a few days later when the decree allowed only $100 per month. The judgment will, therefore, be reversed.

REVERSED.

463 - 22418

E. L. ESSLEY MACHINERY COMPANY,
a corporation,
Appellee,

vs.

DANN OIL CUSHION SPRING INSERT
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 600

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case was tried before the court without a jury. No propositions were submitted to be held as the law of the case and there were no rulings involving any controlling question of law. On the record as presented, therefore, the only question for review is whether or not the findings and judgment of the court are contrary to the evidence. (Flodin v. N. H. Lutes Co., 191 Ill. App. 195.)

Appellee's statement of claim is in the nature of a quantum meruit for merchandise sold and delivered, consisting of parts of a machine, viz., fly wheel presses, roller feeds and dies. Appellant's affidavit of merits avers that plaintiff guaranteed that they (or the machine) would do defendant's work satisfactorily for one year after installation, that they broke down and that plaintiff refused to accept their return. The defendant assuming the burden of proof, introduced in evidence its written order for the parts or machine in question and what amounted to plaintiff's written acceptance. The order called for their delivery the last of June, 1914, to be paid for in sixty

days, and contained this provision:

> "The above complete machine and dies are to be made of the best material obtainable for this purpose, and are to be guaranteed to do our work in a manner satisfactory to us for one year from the date of their installation.
>
> In case this machine or dies prove defective, or do not do our work in a manner satisfactory to us, it is understood that we can return same and that you will pay back the full purchase price."

The said parts or machine constituted a combination for cutting and perforating metal strips for use in lubricating springs. Shortly after the machine was received one of the gears made of cast-iron broke. Appellee on request supplied a new one of bronze which a few days later also broke. That was replaced by a steel gear furnished by appellee which after short use broke the gear that meshed into it. Other defects were disclosed. The counter weights intended to avoid excessive vibration fell off. The rollers permitted the metal strips to slip so that the perforations were irregular, thus causing much waste of material. The rod connecting with the feeding device frequently bent so as to necessitate stopping the machine immediately. Unrefuted evidence tended to show the machine would not accomplish in a reasonably satisfactory manner the work it was guaranteed to do. Defendant was therefore compelled to abandon the use of the machine in September, 1914, after thus experimenting and finding it inadequate to perform such work. Even the designer of the machine, called as a witness for plaintiff, testified that he could not tell why the gears broke and was ignorant of the other discovered defects, and no evidence was offered reasonably tending to show that with such defects the machine would do reasonably satisfactory work, or, in fact, accomplish the real purpose for which it was made and sold.

The month after defendant ceased to use the

machine appellant's general manager had a conversation with an officer and agent of the appellee Company, who negotiated the sale of the machine, with reference to its return. The former claimed that the latter agreed to call for and take it back at once, and the latter denied making the agreement. The former, however, was corroborated by appellant's sales manager who was present at the conversation. A few days thereafter appellee instead of calling for it brought this suit on a quantum meruit instead of the contract. Except as to such agreement and an alleged conversation after sixty days about paying for the machine, there was no material conflict of evidence.

From the evidence so adduced we think the finding and judgment were contrary to the evidence. Under the agreement appellant had the unquestioned right, if the machine was not "satisfactory", to return it at any time within a year. The fact that it was not paid for at the end of sixty days did not entitle plaintiff to abandon its contract and sue on a quantum meruit, nor affect appellant's right under the contract to have the machine returned if it did not prove satisfactory after that time, for even if it was paid for and proved unsatisfactory within a year the purchase price was to be returned. That it was not satisfactory in the sense such contracts are construed even as claimed by appellee, was clearly established and not refuted.

Appellee contends that because the payment was not made as specified it could abandon the contract and sue in assumpsit. The cases cited to support that contention are easily distinguishable in their character and the facts from the one at bar. Plaintiff could not thus avoid its contract obligation to take back the machine under the circumstances, and return the money if it had been paid.

While there might otherwise be a question whether it was appellant's duty to return the machine when it ceased to use it and found it unsatisfactory, the preponderance of the evidence was that appellee agreed to come and get it and thus waived performance in that respect by appellant if required by the contract. As there is no question other than one of fact open for review on the record as presented, we are compelled to reverse the judgment as contrary to the evidence.

REVERSED WITH FINDING OF FACT.

REMANDED WITH FINDING OF FACT.

463 - 22413

FINDING OF FACT.

We find that appellee, E. L. Manley Machinery Company, guaranteed that the machine and dies, for the purchase price of which it brought this suit, guaranteed them to do the work in a satisfactory manner, for one year from the date of their installation and that in case the machine or dies proved defective or did not do appellant's work in a satisfactory manner they were to be returned, and, in case they were paid for, appellee was to pay back the purchase price; that the machine and dies were defective and did not perform the work they were guaranteed to do; that no payment was made and within four months from their installation said appellee agreed to take back and come after said machine and dies; that appellee did not come after them and has not performed its contract and is not entitled to a recovery either on a quantum meruit or the contract under which it delivered the goods in question.

493 - 22457

BOSLEY BROTHERS, (a corp.),
Appellee,

vs.

THE LAWNDALE IRON AND WIRE WORKS, (a corp.),
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 602

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question for our consideration upon this record is whether or not the judgment is contrary to and against the weight of the evidence. Certain points of law are discussed that are not before us for review, as the case was tried before the court without a jury and no propositions of law were submitted, and the questions discussed do not arise on rulings upon the evidence. (Flodin v. Lutes Co., 191 Ill. App. 195.)

A judgment was rendered for the amount found due upon a judgment note given by appellant to appellee. It was reduced to $400 by a payment after it became due, and the main question of fact presented is whether four notes of $100 each secured by mortgage, were delivered by appellant to appellee in payment of the note sued on or as collateral security. The evidence was conflicting upon the matter and without reviewing it here it is enough to say that we are not disposed to disturb the court's finding to the effect that said notes were given as collateral security. The court's facilities for determining the credibility of the witnesses, upon which the weight of the evidence largely depended, were better than ours.

2051.V.602

the only exception for our convenience when
it was necessary to employ it was the judgment in indirect
of law was directed that one must believe in (or trust)
to the extent the weight of the evidence. Certain points
on the one hand and the state witness on the other,
Instes Do". Jal III. Apo. 195.)

A judgment was rendered for the county found due
upon a instrument note given by plaintiff to appellee. It was
by [illegible] and [illegible] by defendant, and the question
[illegible] was argued at length, and cited [illegible] to
main question of fact presented is whether [illegible] at
learned [illegible] below at present time, was the
[illegible] in payment of the note sued on or no consent
according to [illegible] the evidence was conflicting upon the matter and
but disposed to disturb the court's finding on the at least
that only notes were given as collateral security. The
court's [illegible] for determining the credibility of the
witness, upon which the weight of the evidence largely
depended, made parts them mute.

422 - Dent

Appellant, (a corp.),
Appellee.

vs.

Appellee, (a corp.),
Appellant.

Whether the collateral security should have been surrendered (as contended for) at or before the trial is a question of law not raised upon this record, but if it were, we should deem the authorities cited by appellant upon that subject as settling the question beyond doubt.

AFFIRMED.

Whether the collateral security should have been strengthened (as contended for) or not before the grant is a question of law not raised on the record. Only if it were, we should deem the authorities cited by petitioner thus fully refuted to sustain the question presented herein.

WHEREFORE,

Whether the collateral security should have been strengthened (as contended for) or not before the grant is a question of law not raised on the record. Only if it were, we should deem the authorities cited by petitioner thus fully refuted to sustain the question presented herein.

496 - 22462

FLORENCE M. ENSMINGER,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 603

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment entered upon a verdict for $2200 in favor of appellee, the plaintiff below, against appellant, the defendant. The basis of the cause of action is the claim that defendant carelessly and negligently started its car on which the plaintiff was a passenger while she was in the act of alighting from it. In two counts of the declaration it is averred that defendant negligently closed a door of the car, whereby plaintiff's wearing apparel was caught, causing her as the car started to be forced off the car and injured. Appellant claims that the verdict was against the weight of the evidence and excessive and influenced by erroneous instructions.

The main controverted questions of fact were whether the car, after stopping for plaintiff to alight, again started before plaintiff alighted therefrom, and whether she fell by reason of her garment being caught or on account of the condition of the street. On these matters there was a conflict of evidence, plaintiff and one witness testifying one way and the motorman and conductor of the car another. Testifying directly on the question as to whether her garment

Defendant's Counsel.

Plaintiff's Counsel.

Mr. Justice Lawton Brown

Judgment

The object is hereafter to endeavour a judgment
against each a verdict for $2000 in favor of Sybella, the
plaintiff below, against Sybella, the defendant. The
basis of the award of notice is the claim two defendant
carelessly and negligently crashed its car so with the
plaintiff was a passenger with one was in the act of
alighting from it. In the course of the deliberation it is
meeting that defendant negligently closed a door of the
car, whereby plaintiff's wrecking injured was caught,
pon as the car started to be forced of the car and injured.
Defendant claims that the verdict was against the weight of
the evidence and excessive and delivered of assessment in-
structions.

The main controversial question of fact was
whether the car, alone alighting for sybella to alight.
Sybella stated before plaintiff alighted therefore, and shortly
the fact of issues of her present knife caught or as account
of the condition of the street. On three matters there was
a conflict of witness, plaintiff and one witness testified
one act and the defendant and conductor of the car murder.
Testified directly on the question as to whether her passenger

was caught she and one witness testified in effect that it was and the motorman that it was not. There was other evidence tending to give color to one contention or the other which we deem it unnecessary to review, for, after careful examination of all the evidence, we are unable to say that the verdict was manifestly against the preponderance of the evidence. As usual the credibility of the witnesses enters into consideration of the weight to be given to the testimony of the several witnesses, which, as we have frequently had occasion to say, the jury are usually better able to determine than we are.

Nor do we feel warranted in disturbing the judgment on account of the size of the verdict. Plaintiff suffered a dislocation of her left shoulder. Her doctor stated that there were torn ligaments of the shoulder blade and arm and also testified to her condition of nervousness. She testified to constant pain as a result of the accident, loss of sleep, nervousness and inability to lie in bed on her injured arm, and to use her arm as before the accident in lifting with it or extending it. As to these matters she was corroborated to some extent by other witnesses. Against this evidence was only that of a physician as to the usual consequences of such a dislocation. The issue of fact as to the extent of her injuries also depended much on plaintiff's credibility, and while the damages assessed would be large unless she suffered from the pain and nervousness testified to, yet in view of the evidence thereon, if believed by the jury, we are not prepared to say that the amount of the verdict was not warranted.

We find no reversible error in the instructions. The first one complained of was abstract in form and related

to the degree of care and caution to be exercised by a common carrier for the safety and security of its passengers while being transported. The criticism goes to its form and its alleged assumption that the plaintiff was a passenger, which, according to appellant's contention, she had ceased to be at the time of her injury. While subject to criticism because of its form, we do not think it carried such assumption but think that the jury, in view of other specific instructions as to what constituted a passenger, would naturally interpret the instruction as applicable only in case the jury found she was a passenger.

Complaint is made of the following instruction: "Ordinary care as used in this instruction, is such care as an ordinarily prudent person would use for her own safety under like circumstances as those shown by the evidence in this case." The criticism is that this instruction assumed that plaintiff's care was in question under any view of the case and excluded defendant's theory that regardless of her care, or want of it, she could not recover if she was injured after she alighted from the car. Or, in other words, that the instruction injected into the case the issue of her care, when, if the jury took defendant's theory of the case, it was not involved. Even though the jury took such view we fail to see how the instruction could have injured defendant.

Instruction 4 reads: "The court instructs the jury that if from a preponderance of all the evidence, and under the instructions of the court you find the defendant guilty as charged in the declaration, then you should assess the damages herein."

It is contended that this instruction directs a verdict for plaintiff regardless of whether she exercised

ordinary care for her own safety. We think it would be straining its import to give it that interpretation. The jury were properly told in several other instructions upon what conditions of fact the defendant could not be found guilty, and that the exercise of ordinary care on the part of plaintiff, even though defendant was negligent, was essential to her recovery. Taking the instructions together, the jury must have construed said instruction as merely telling them that if they found the defendant guilty under the instructions directing a verdict it was their duty to assess the damages. While the instruction might have been more skillfully phrased, we do not think the jury were misled by it.

Complaint is made that another instruction on the question of computing damages told the jury they might take into consideration any permanent disability and her inability to work, whereas the declaration did not allege permanent injury, or inability to work beyond the period of six weeks. There was evidence given of permanent disability and inability to do the same kind of work after the accident that plaintiff did before. So far as there was a variance in this respect between the proof and declaration no objection was made to it. Had objection been made plaintiff might have amended her declaration so as to render the evidence admissible. As the evidence was not objected to and related to the extent of the injuries claimed to have been sustained from the negligence charged, we think it a case where the defect in the declaration was one cured by a verdict and that no reversible error could for that reason be predicated upon the instruction.

Finding no reversible error we affirm the judgment.

AFFIRMED.

Finding no reasonable excuse we affirm the judgment.

222 - 22652

THE MARMON CHICAGO COMPANY,
(a corporation),
Plaintiff in Error,

vs.

C. E. HEATH, J. S. FOLLETT, G. HEATH,
A. D. WHITMAN,

A. BURNS and M. EVANS,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 605

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Defendants in error issued an insurance policy in which they insured plaintiff in error and one Frederick Ring "as their respective interests might appear" against damage to an automobile for loss occasioned by fire. This suit was brought upon the policy to recover such a loss. The policy contains this condition: "That the automobile insured shall not be used for renting purposes or for hire." It appeared that said Ring was in the automobile delivery business, doing business under the title of Aetna Auto Delivery Co., and had been using the car in question in his garage for livery purposes and uses. Apparently from the evidence the car was used mainly, if not entirely, for such purposes.

It appears that Ring bought the automobile from plaintiff in error and gave back a mortgage for part of the purchase price.

In view of plaintiff in error's position as mortgagee the court was requested to hold as a matter of law that a recovery could be had for the damage sustained by

fire "unless it used the automobile for purposes forbidden by the insurance policy." It is urged as error that the court refused to so hold, counsel contending that the policy should be liberally construed in favor of the insured. While the policy should be so construed yet it can not be construed contrary to its manifest intent, and the court can not ignore conditions of the policy to which the parties expressly agreed. The condition referred to was certainly applicable to King, the owner and mortgagor, and binding on plaintiff in error, the mortgagee. Continental Ins. Co. v. Cox, 92 Ill. 145; Am. Central Ins. Co. v. Birds, 87 Ill. App. 258. The judgment will be affirmed.

AFFIRMED.

605 - 22003

295 I.A. 606

FELIX LILIKIS, Admr. of the estate of Kazuny Lilikis,
Appellee,

vs.

WILLIAM F. BOSSI, doing business as WILLIAM F. BOSSI CONTRACTING COMPANY, a corporation, and CHICAGO CONSOLIDATED BREWING & MALTING COMPANY, a corporation.

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CHICAGO CONSOLIDATED BREWING & MALTING COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to review and reverse a judgment for $6,000 and costs entered in favor of appellee. Although the judgment was against both defendants jointly, this appeal is prosecuted solely by the Consolidated Brewing & Malting Company, hereinafter referred to as the Consolidated Company.

Plaintiff's intestate, a girl of eleven years, was struck by a piece of wood dropped from the window of a building owned by the Consolidated Company, situated at the southeast corner of Canal and Eighteenth streets in the city of Chicago. Death was almost instantaneous.

The building in question was a seven-story brick structure, and was used as a malt house, dry kiln and warehouse. At the time of the fatality, it was undergoing alterations and repairs. This work was being done by

Z 605 I.J. 606

defendant William F. Bossi.

There was no dispute as to how the accident occurred. Four occurrence witnesses testified on behalf of the plaintiff, that the piece of wood which caused the fatality, was dropped from a seventh-story window and that its course was deflected by a telegraph wire, causing it to strike the deceased who was said to have been standing in the street several feet from the sidewalk. Three of these witnesses stated that they heard no warning given before it was dropped.

It also appeared from the testimony of these witnesses, that the sidewalk on the Eighteenth street side of the building was transversely barricaded at both ends, but it is not quite clear from their testimony whether the barricade extended along the outer edge of the walk or not.

The evidence on behalf of defendants showed that the work was let under an oral agreement, on a percentage basis, i. e. the said Bossi was to receive 10% over and above the cost of furnishing the labor and material to complete the work.

One Whyte, who was defendants' only witness, testified that he was supervising engineer for a corporation known as the George Bullen Company, which had occupied the said premises for upwards of twenty years, although he could not state whether any lease had ever been entered into between the said Bullen Company and the Consolidated Company or any other arrangement made for the occupancy of the said building; and that to his knowledge it had never been occupied by the Consolidated Company. He also testified that in making the said verbal contract with Bossi he acted on behalf of the Bullen Company.

There was a stipulation between the parties, to the effect that both these companies had the same officers and

stockholders; that they occupied the same offices; that one Brain, superintendent of the malt house located in said premises was employed and paid by the Consolidated Company; that the said Whyte, who was the superintendent of buildings for the Bullen Company, acted in a similar capacity for the Consolidated Company at and prior to the time of the fatality, and that he was paid by check of the Consolidated Company.

Various questions present themselves for determination on this appeal; the controlling one being, whether or not the said Bossi was an independent contractor while engaged in repairing the said building.

Whyte testified that under the aforesaid verbal agreement with Bossi, the latter was to do all the work, furnish all the material, employ all the men, and was to be paid the cost thereof and 10% in addition; that he (Whyte) determined what repairs should be made before Bossi started to work; that he went to the building two or three times per week while the work progressed; that one side of the building was repaired at a time; that after Bossi had removed all the sheeting so that the construction from the side was exposed to view, Whyte then determined what amount of timber should be removed and replaced and what should remain; that "I went over it and designated how it should be done and then he went ahead and finished that section and then I did the same thing on the next one." He testified further, as follows:

> Q. "You had a right to say whether he had too many men on the job, didn't you? A. Well, yes if he -
>
> Q. "If he hired more than you thought was necessary and you were paying more, you would say so, wouldn't you? A. Well, I probably would take the contract away from him."

In view of the foregoing testimony, we are of the opinion that the said Whyte had the right to determine, as

the work progressed, what timbers should be replaced and how the work should be done; the number of men to be employed in the execution thereof, and to cancel the contract in the event his orders were disobeyed; that consequently the said Bossi was subject to Whyte's orders as to the time and manner and mode of doing the work; in other words that Bossi was a servant and not an independent contractor. Lenihan v. Rolling, 137 Mass. 183.

The question next arises, whether or not the said Whyte, in making the contract with Bossi and in supervising the work in question, was acting as the representative of the Bullen Company; and if so, whether or not the Bullen Company and the Consolidated Company, were so jointly associated as to constitute but one organization, so as to render the one liable for the negligence of the other.

Whyte testified that he was employed as superintendent of buildings by the Bullen Company. But it was stipulated that he was also employed in a similar capacity by the Consolidated Company, and that he was in fact paid for his entire services by the latter company. And while he further testified that he made the contract with Bossi on behalf of the Bullen Company, yet in view of his inconsistent statements and his testimony as to facts contrary to the stipulation of the parties and other facts and circumstances in evidence, the question which of these two companies he represented or whether he was acting on behalf of both in the transaction in question, became one of fact for the determination of the jury.

It will be noted that there was an identity of officers and stockholders in the two corporations; that both occupied the same offices; that there was no evidence of any lease or other arrangement between the two companies

for the occupancy of the said building, nor of any rent having ever been paid by the Bullen to the Consolidated Company; that they had a similarity of purpose. And while the said Whyte testified that the Bullen Company had been in sole possession of the said premises for upwards of twenty years and that the Consolidated Company had never occupied them during said period, yet it was stipulated that the superintendent of the malt house located in said premises was employed and paid by the Consolidated Company.

All of the foregoing circumstances were in evidence and necessarily had a material bearing upon the ultimate issues hereinabove set forth, to be determined by the jury. (Asplund v. Conklin Construction Co., 165 Ill. App. 44.) By their verdict the jury decided them in favor of the plaintiff, and from a careful consideration of all the evidence, we are not disposed to disturb their finding. Chicago Economy Fuel Gas Co. v. Myers, 168 Ill. 138; Feard v. State of Maryland, 219 Fed. Rep. 827.

It is next contended that the damages assessed by the jury are excessive. We are not impressed with counsel's argument that because the deceased was of foreign parentage and lived in a poor neighborhood, her opportunities in life were to be circumscribed thereby and that hence the damages allowed were excessive. The assessment of damages in cases of this character rests in the sound discretion of the jury, under the guidance of proper instructions. (C. & A. Ry. Co. v. Strong, 129 Ill. App. 511; C. C. Ry. Co. v. Reddick, 139 Ill. App. 160.) And while it may be conceded that it is difficult to determine them to a mathematical certainty, yet it is equally difficult to say that a verdict for $6,000 is excessive.

Other errors have been assigned but which we

consider it unnecessary to discuss, save to say that they are without merit.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

JUSTICE BARNES: I think the evidence shows Rossi was an independent contractor.

213 - 22166

MICHIGAN AVENUE TRUST COMPANY,
a corporation,
Defendant in Error,

vs.

ALBERT T. GRAHAM, HARRY M. WELLS, WILLIAM E. FULLER and JAMES C. HOSKINS,

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ALBERT T. GRAHAM and WILLIAM E. FULLER,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 608

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action by defendant in error, the Michigan Avenue Trust Company, against Albert T. Graham, Harry M. Wells, William E. Fuller and James C. Hoskins, on a contract of guaranty. By direction of the court, the jury found the issues against the defendants and assessed plaintiff's damages in the sum of $10,000, for which amount and costs the judgment herein complained of was entered.

Plaintiff's claim is based upon a written contract of guaranty signed by the defendants, wherein, among other things, they guaranteed the prompt payment at maturity, of all existing or future indebtedness of the Automobile Construction Company to the plaintiff.

The statement of claim alleges inter alia that the said Automobile Construction Company executed and delivered to the plaintiff its six (6) promissory notes aggregating upwards of $10,000; that demand was made of the said Automobile Construction Company for the payment of the

No. 2021.V. 608

as.

said notes, and that payment had not been made; that plaintiff had received no payments on said notes except as therein enumerated; and that there was due and unpaid on said notes a balance of more than $10,000.

To this statement of claim defendants Wells, Graham and Fuller filed an affidavit of defense, setting up an agreement of release whereby in consideration of these defendants' transferring and assigning over the stock held by them in the Automobile Construction Company to defendant Hoskins, and resigning from their respective offices in the said company, the guaranty was canceled and fully satisfied as to them, and that the said defendants Wells, Graham and Fuller were wholly released and discharged of any and all liability arising under and growing out of the said guaranty.

The evidence tends to show that owing to financial straits, the said Automobile Construction Company was unable to meet its obligations, and that sometime during July, 1913 all of the defendants had a conference with one Fitzsimmons, who at that time was the cashier of the plaintiff bank, wherein ways and means were discussed to help the said company out of its difficulties; and that subsequently the following memorandum was drawn up and signed by the several parties thereto:

"Agreement.

To A. T. Graham, W. E. Fuller and H. M. Wells.

In consideration of the transfer of all their stock in the Automobile Construction Company to me endorsed by them in blank, I hereby agree to pay in $3,000 cash to Treasurer of said Company immediately, and furthermore to pay off all indebtedbess owing to Michigan Avenue Trust and Standard Trust and Savings Bank, providing business can be put on basis permitting such action within reasonable time.

(Signed) JAMES C. HOSKINS."

The testimony of defendant Wells indicated that

the said Fitzsimmons was present when the foregoing agreement was executed, at which time it was submitted to him, and that he stated it was "all right," while defendant Graham testified that Fitzsimmons informed him that the defendants in question would be relieved of further liability if they assigned their stock in the Automobile Construction Company to Hoskins.

Plaintiffs in error (Graham and Fuller) contend that the court erred in directing the jury to find the issues for the plaintiff; that the court should have submitted to the jury the question whether or not plaintiff by its officer had released from further liability the defendants Wells, Graham and Fuller, when the stock was assigned and the aforesaid agreement was entered into.

From the foregoing testimony, a part of which was overlooked in our former opinion, it will be seen that there was some evidence in the record tending to establish said defendants' claim that they had been released from further liability on the guaranty in question, and hence the case should have been submitted to the jury on that ultimate issue of fact.

It is also urged that plaintiff did not make out a prima facie case by introducing the notes in evidence, but was also required to show that they had not been paid.

The statement of claim alleged that the notes in question had not been paid, except for certain payments therein enumerated. Defendants' affidavit of merits made no defense of payment. Consequently it was not necessary that plaintiff should prove the nonpayment of said notes, this having been admitted by the pleadings.

After a careful re-examination of the entire record

we are of the opinion that the trial court erred in directing a verdict for the plaintiff. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

35 - 22277

D. B. DOWSMA,
Defendant in Error,

vs.

LOUIS C. KRUEGER, trading as KRUEGER BROTHERS, and CARMINE RIZZUTO,

CARMINE RIZZUTO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

205 I.A. 609

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error, Dowsma, brought an action under section 28 of the lien act, ch. 82, R. S., to recover $238.00 for certain labor and materials alleged to have been furnished by him as a subcontractor, on a building owned by defendant, Carmine Rizzuto. The jury found the issues for the plaintiff and the court entered judgment thereon for the aforesaid amount and costs.

In an action of this kind, to sustain a recovery against the owner and contractor jointly, as in the case at bar, plaintiff must show that he is entitled to a lien on the premises. This is an indispensable prerequisite, (Malleable Iron Co. v. Brennan, 174 Ill. App. 38.) And the judgment must recite the date when the lien attached. Zechman v. Feigenbaum, 163 Ill. App. 366.

The judgment now before us contains no such recital, nor does the evidence show that plaintiff was entitled to a lien. It must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

2051.V. 603

3042

368 - 22323

D. I. FELSENTHAL COMPANY, a corporation, for the use of Charles R. Carpenter, Appellant,

vs.

THE NORTHERN ASSURANCE COMPANY, LIMITED, OF LONDON, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

205 I.A. 610

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant (plaintiff below), brought an action for the value of certain goods destroyed by fire on March 6, 1912, which property was insured under a policy of insurance issued by the defendant. The defense chiefly relied upon was incendiarism. The jury found the issues for the defendant and from the judgment entered thereon, plaintiff appeals.

Plaintiff contends that being a corporation, it cannot be charged with having willfully set fire to its premises, unless it be shown that all of its stockholders had knowledge thereof and concurred in the act.

It appears from the evidence, that plaintiff is an Illinois corporation, capitalized at $15,000, its stock being divided into 150 shares of a par value of $100 each; that prior to and at the time of the fire, one Morris L. Fox was its president, one H. I. Felsenthal its vice president, and the latter's brother, D. I. Felsenthal, its treasurer; that the said Fox owned 75 shares and the Felsenthal brothers and their father owned the remaining 75 shares.

The evidence further shows that the aforesaid

U. I. Commercial Company,
a corporation, for the use
of Charles S. Carpenter,

Appellant,

vs.

Appellee.

ALFRED FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HOFFMAN delivered the opinion of the court.

Appellant (plaintiff below), brought an action for the value of certain goods destroyed by fire on March 6, 1919, which property was insured under a policy of insurance issued by the defendant. The defense chiefly relied upon was incendiarism. The jury found the issues for the defendant, and from the judgment entered thereon, plaintiff appeals.

Plaintiff contends that being a corporation, it cannot be charged with having willfully set fire to its premises, unless it be shown that all of the stockholders had knowledge thereof and concurred in the act.

It appears from the evidence, that plaintiff is an Illinois corporation, capitalized at $10,000, its stock being divided into 100 shares of a par value of $100 each; that prior to and at the time of the fire, one Harris P. Fox was its president, one H. I. Polsenthal its vice president, and one Isador Wachner, U. I. Polsenthal, its treasurer; that its sole business was dealing in cigars.

The evidence further shows that the defendant

Fox had loaned the plaintiff company various sums of money, aggregating upwards of $30,000; that about two weeks prior to the time of the fire in question, the Felsenthal brothers severed connections with the plaintiff company and associated themselves with a firm engaged in a similar pursuit. At this time the plaintiff was still indebted to the said Fox in the aforesaid sum, to secure which the said Felsenthal brothers each gave the said Fox a note for $15,000; they and their father also assigned and turned over their 75 shares of stock in the plaintiff company to the said Fox, so that the latter acquired the entire capital stock in the plaintiff company; in addition to which the said Felsenthal brothers made an assignment to the said Fox of all profits to be derived by them from the company with which they were to become connected.

It further appears from the evidence, that at this time the Felsenthal brothers desired to close up the plaintiff company's business and liquidate its assets, but the aforesaid Fox decided to continue it alone.

Evidence was introduced on behalf of the defendant which, if true, tended to show that the said Fox and D. I. Felsenthal had made arrangements with one Rosenberg who, with a co-conspirator, - one Ben Fink - was to set fire to plaintiff's place of business, to enable plaintiff to collect the insurance thereon. Countervailing proof was submitted on behalf of the plaintiff. The jury having returned a verdict for the defendant, evidently were of the opinion that the fire in question was of incendiary origin, and from a careful examination of the evidence, we are convinced that they were warranted in so finding.

The evidence shows that the said Fox became affiliated with the plaintiff company in December, 1910,

at which time one-half of the capital stock was given to him by the Felsenthal brothers because of the financial aid he had rendered them, 50 shares of which he took in his own name and 25 in the name of one Nate Silver, his brother-in-law. There is no evidence in the record that the said Silver ever paid any value for these 25 shares. In our opinion, he was merely the nominal holder, and the said Fox the real owner of this stock.

When the Felsenthal brothers withdrew from the plaintiff company they and the senior Felsenthal assigned and turned over their entire stock holdings therein to the said Fox. Although these latter 75 shares, which were indorsed in blank and delivered to the said Fox, were never transferred to him on the books of the plaintiff company, still we are of the opinion that the said Fox was the real owner thereof. Under such circumstances, Fox being the real owner of all the stock of the said company the act of incendiarism precludes plaintiff's right to a recovery. Meily Co. v. London & Lancashire F. I. Co., 148 Fed. Rep. 683; Kirkpatrick v. Allemannia F. I. Co., 92 N. Y. Supp. 466.

Other points have been raised by the plaintiff with reference to rulings on the admissibility of evidence and instructions to the jury. In our opinion, however, they are not of sufficient moment to warrant us in disturbing the judgment, which in view of the evidence could not properly have been otherwise.

Finding no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

438 - 22393

WILLIAM D. SELVAGE by next friend CATHERINE SELVAGE,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 621

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below) recovered a judgment for $5,000 for injuries which he sustained as a result of being struck by a street car operated by defendant. The declaration which contained four counts, charged defendant with operating its car in a careless and negligent manner, failure to sound a gong, and also with willful and wanton negligence.

The accident occurred on October 30, 1911, between the hours of 5:30 and 6:00 P. M., at or near the intersection of State and Sixtieth streets, in the city of Chicago.

State street runs north and south; Sixtieth street runs east and west, and crosses State street at right angles. Defendant operates a double-track street car system in State street; the east track being used by northbound cars and the west track by southbound cars. Defendant's car which struck plaintiff was moving in a southerly direction.

If plaintiff's version of the manner in which the accident occurred is the true one, then he was in the act of crossing State street on the south crosswalk of Sixtieth street at the time he was struck. According to defendant's theory, however, plaintiff was struck by its southbound car,

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not at the Sixtieth street intersection but somewhere between Sixtieth and Sixty-first streets, while he was riding on the left-hand or "blind" side of a northbound car.

Several errors have been assigned as grounds for reversal. However, in our view of the case, it is necessary to consider only one, viz., whether or not the court erred in the giving of instruction No. 7 on behalf of the plaintiff. This instruction was as follows:

> "You are instructed that the plaintiff was only required to use ordinary care. You are further instructed that ordinary care, as defined in those instructions, is that degree of care and caution which a person of the like age, experience and degree of intelligence of the plaintiff, as shown by the evidence, would have exercised under like circumstances and in the situation in which the plaintiff was placed, as shown by the evidence."

The vice of this instruction is, that it confines the necessity of exercising due care to the instant when the accident occurred, regardless of plaintiff's conduct just preceding the accident. (North Chicago Street Railroad Company v. Cossar, 203 Ill. 608.) It pre-supposes the exercise of ordinary care on the part of the plaintiff in placing himself in the position in which he found himself at the time of the accident, whereas there is evidence from which the jury might reasonably have found that he was negligent in getting into such a position.

Plaintiff testified that he left his place of employment at Sixty-first and State streets just before 5:30 P. M., and that it was raining slightly; that he walked north on the east side of State street to the south crosswalk of Sixtieth street, where he turned west to cross State street; that before he started across, he looked to see if there were any cars coming; that he neither saw nor heard any; that he stepped off the curb and walked west about five steps;

that he looked again and didn't see any cars, and then started directly across the street; that the next thing he knew he was struck by a southbound street car. On cross examination he testified that his view both to the north and south was unobstructed and that he could see for 200 feet in either direction; that "when I got to the northbound track, the first track, it is not my business to look north then. When I started on the track I was supposed to go through, I had no time to look. I looked before I stepped to the track. I was about two steps from that track when I looked. I did not see any car then. Then I walked across that track and by the time I got to the second track I was hit." The undisputed evidence shows that defendant's car was running at a moderate rate of speed at the time in question.

On this state of the record, we are of the opinion that the court erred in giving instruction No. 7, and this error was not cured by any other given instruction. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

448 - 22403

MICHAEL KRAMP, Appellee,

vs.

LOUIS THEXTON, Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 622

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This appeal presents for review an order directing the receiver of certain premises to pay to the appellee $4,798.29 in satisfaction of a deficiency decree entered in his favor, in a foreclosure proceeding. This cause having been before this court on two previous occasions, we need not restate the facts pertaining thereto, as they are fully set forth in our prior opinions. Kramp v. Kramp, 185 Ill. App. 464; Kramp v. Thexton, Gen. No. 21673 (not yet reported).

It is contended by appellant that the court erred in directing that the rents and profits of said premises collected during the period of redemption be paid to the owner of the deficiency decree, because (1) they were not specifically pledged by the trust deed foreclosed; and (2) because appellant was not personally liable for the mortgage indebtedness.

Appellee argues, however, that the said trust deed does pledge the rents, issues and profits in question; that this cause having been up for review on previous occasions, the former decrees of the lower court and the opinions of this court are res judicata of this question.

The trust deed in question contained the following provision with respect to the rents, issues and profits collected by the receiver during the period of redemption. "To pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales."

It has been repeatedly held that such a provision does not pledge the rents, issues and profits collected during the period of redemption. (Stevens v. Pearson, Ill. App. Gen. No. 21839, not yet reported; Standish v. Musgrove, 223 Ill. 500; Schaeppi v. Bartholomae, 217 Ill. 105); and the owner of the equity of redemption is entitled thereto unless he has assumed the indebtedness and there is a deficiency decree against him personally, in which event they must be applied in payment of the deficiency decree. Standish v. Musgrove, supra.

The decree of July 17, 1914 found that appellant and John Kramp, co-defendant, were personally liable for the said indebtedness; a deficiency decree was accordingly entered against them, and the receiver ordered to remain in possession of the premises during the period of redemption, "for the purpose of collecting such deficiency or such part thereof as he may be able to collect." But by a subsequent order, this decree was modified by vacating that provision thereof which found that appellant was personally liable for the said indebtedness. This order of vacation necessarily effected every part of the decree that was inconsistent therewith, respecting the payment of the rents, issues and profits collected during the period of redemption, and hence it likewise vacated the order to the receiver to collect the amount of the deficiency decree, which provision was obviously

predicated upon the finding that appellant was personally liable for the said indebtedness.

Under such circumstances, the question whether or not appellant, the owner of the equity of redemption is entitled to the rents in question, is now properly before us for determination.

In view of the fact that the trust deed does not pledge such funds, and there being no deficiency decree against the appellant personally, it must be held that he is entitled to the rents collected from the said premises during the period of redemption.

The decree will therefore be reversed and/remanded the cause, with directions to enter a decree in accordance with the views hereinabove set forth.

REVERSED AND REMANDED WITH DIRECTIONS.

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451 - 22406

J. J. BADENOCH COMPANY,
a corporation,
Appellee,

vs.

ALFRED J. BARTNICK and
GUSTAV P. BARTNICK,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

205 I.A. 623

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee filed a suit in assumpsit against the Bartnick & Son Company, a corporation. Attached to its declaration was an affidavit in support of the claim. Afterwards appellee amended its declaration by adding Alfred J. Bartnick and Gustav P. Bartnick, co-partners, as additional defendants, and dismissed the original defendant, the Bartnick & Son Company from the case. Nonnew affidavit of claim was filed by plaintiff. Subsequently various pleas were filed by appellants, all of which were stricken from the record on motion of appellee, and a default entered against the defendants for want of a sufficient affidavit of merits, after which the court entered the judgment herein complained of on the original affidavit without other proof.

While several points are urged on this appeal for a reversal of the judgment, yet in our view of the case it is necessary to consider only one, viz., whether or not the amended declaration was properly supported by affidavit.

At the time the suit was brought and the declaration and affidavit of claim filed, the sole defendant was the Bartnick & Son Company, and therefore the defendant referred to in the affidavit of claim must necessarily have been said

Company. When the other two defendants were added and the declaration amended accordingly and the original defendant dismissed from the case, an affidavit in support of the amended declaration against the substituted defendants was indispensable to the right of the court to enter judgment without other proof. Gypsum Fireproofing Co. v. Newlson & Levin, Ill. App. No. 23412, not yet reported.

Nor can it be successfully contended that appellants have waived this point. When their affidavits of merits were stricken from the files, they were theoretically out of court and the judgment taken was as by default. It therefore became necessary for appellee to support its claim by a proper affidavit of merits or other competent evidence. It having failed therein, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

499 - 22465

CHARLES BUSACK,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

205 I.A. 629

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below), recovered a judgment for $4,750 and costs against appellant, for personal injuries received while a passenger on one of its cars. The negligence charged in the declaration was as follows: that defendant owned and operated a street railway running north and south on Cottage Grove avenue in the city of Chicago; that plaintiff was a passenger on one of its southbound cars; that there was an enclosed vestibule at the front end of said car and a door in the side of said vestibule; that it was customary to keep said door closed and fastened at all times except when the car was standing and passengers were being discharged therefrom; that said door, when closed, was held fastened by a certain latch which was within the control of and operated by the motorman; that as said car was coming to a stop at 64th street, and while still in motion, defendant's motorman wrongfully and negligently unfastened said door, and plaintiff, believing said car had in fact stopped, opened the door and in stepping off was injured.

On this appeal defendant contends: (1) that there is no evidence in the record fairly tending to prove the negligence charged in the declaration, and that the

CHARLES SUMNER,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

205 I.A. 529

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below), recovered a judgment for $4,750 and costs against appellant, for personal injuries received while a passenger on one of its cars. The negligence charged in the declaration was as follows: that defendant owned and operated a street railway running north and south on Cottage Grove avenue in the city of Chicago; that plaintiff was a passenger on one of its southbound cars; that there was an enclosed vestibule at the front end of said car and a door in the side of said vestibule; that it was customary to keep said door closed and fastened at all times except when the car was standing and passengers were being discharged therefrom; that said door, when closed, was held fastened by a certain latch which was within the control of and operated by the motorman; that as said car was coming to a stop at 64th street, and while still in motion, defendant's motorman wrongfully and negligently unfastened said door, and plaintiff, believing said car had in fact stopped, opened the door and in stepping off was injured.

On this appeal defendant contends: (1) that there is no evidence in the record fairly tending to prove the negligence charged in the declaration, and that the

verdict of the jury was against the manifest weight of the evidence both on the question of actionable negligence and also on the question of contributory negligence; (2) that the damages awarded by the jury are excessive; (3) that the jury were improperly instructed. We shall discuss these seriatim.

1. It is argued that in order to recover, proof by plaintiff that it was the custom of defendant not to unfasten the front vestibule door of its cars until they had come to a complete standstill, was indispensable; that no such proof having been made, the judgment cannot be sustained; that the mere unlatching of the door by its motorman did not constitute negligence, in the absence of proof of a custom not to do so until the car had come to a complete stop, and also that such custom was consistent with the practical operation of the line. It is also pointed out that the negligence as charged in the declaration, is predicated upon the existence of such custom, without which the declaration would have been fatally defective as not stating a cause of action; that eliminating the alleged custom from the case for failure of proof there was no actionable negligence established by the evidence.

The declaration contained an averment that plaintiff at the time of the accident was a passenger on defendant's said car. This implied a duty on its part to exercise toward plaintiff the highest degree of care reasonably consistent with the means of conveyance employed and the practical operation of its line; which duty continues until the passenger has had a reasonable opportunity to safely alight.

Plaintiff testified that in the few years prior to the injury during which the pay-as-you-enter type of car

to the injury during which the back-as-can-enter type of car

Plaintiff testified that in the few years prior

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until the passenger has had a reasonable opportunity to

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step, and also that such custom was consistent with the

a custom not to do so until the car had come to a complete

did not constitute negligence, in the absence of proof of

ed; that the mere alighting of the door by its motorman

ough proof having been made, the judgment cannot be sustain-

come to a complete standstill, was inadmissible; that no

nuresten the front vestibule door of its cars until they had

by plaintiff that it was the custom of defendant not to

the injury were improperly instructed. We shall discuss these

sertatim.

I. It is argued that in order to recover, proof

the damages awarded by the jury are excessive; (3) that

also on the question of contributory negligence; (2) that

evidence both on the question of actionable negligence and

verdict of the jury was against the manifest weight of the

had been in use, he had observed that the motorman did not unlatch the front vestibule door to discharge passengers until the car had come to a complete stop. On the other hand, there was testimony on behalf of the defendant to the effect that the motormen usually unlatched the front door just before coming to a full halt. Defendant's assistant superintendent testified that he frequently observed that the motormen usually unlatched the vestibule door with the right hand when within about three feet of a stopping place, and then brought back the same hand to operate the air brake lever, in order to bring the car to a dead standstill.

Neither the plaintiff nor the defendant contend that such testimony was sufficient to prove a fixed and recognized custom with respect to the operation of defendant's exit doors on this type of car. But it did have a material bearing upon the question whether or not plaintiff was in the exercise of due care at and just prior to the time of the accident complained of. In order to prove actionable negligence on the part of the defendant, it was not indispensable that plaintiff either allege or prove any custom with respect to the operation of the exit doors on defendant's cars. If from the evidence it can be reasonably said that plaintiff was warranted in assuming that the unlatching of the door amounted to an invitation to alight from the car, then it is immaterial whether such assumption on plaintiff's part was based upon the existence of any particular custom in this respect or not, and the fact that plaintiff averred the existence of a custom in this connection does not alter the situation. Competent proof thereof, or of any other custom, would, of course, have been admissible.

The question then presents itself, whether under the facts and circumstances in evidence, the unlatching of

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the facts ... circumstances in evidence, the maintenance of

the vestibule door by defendant's motorman constituted negligence. There can be no doubt that under certain circumstances such an act may become negligence; and where there is a conflict in the evidence, even though only a slight one, it would be a question of fact for the determination of the jury.

The testimony submitted on behalf of the plaintiff tended to show that when the motorman unlatched the door, he turned around and looked at plaintiff; that although he saw plaintiff open the door to alight from the car, he gave no warning that the car was still in motion. It also appeared from the evidence that the immediate environment was dark. These circumstances, together with the testimony by plaintiff of his former observations respecting the unlatching of the exit door, and that because of the surrounding darkness he could not see the street pavement as he was about to alight from the car, had a material bearing on the situation and necessarily had to be considered by the jury in determining the proximate cause of plaintiff's injury. There being countervailing evidence by defendant on this point clearly the question whether or not defendant was guilty of actionable negligence, was one of fact for the determination of the jury; and it was also the province of the jury to say from the evidence whether or not plaintiff was guilty of contributory negligence.

These two controlling questions, viz.: whether or not defendant was guilty of actionable negligence which was the proximate cause of plaintiff's injuries; and whether or not plaintiff was guilty of contributory negligence, were determined in favor of the plaintiff. From a careful examination of the record, we cannot say that such verdict was clearly and manifestly against the weight of the evidence,

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tiff knew that when the motorman untethered the
door, he turned and looked at plaintiff; that al-
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car, he learning that the car was still in motion.
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this [illegible] the question whether or not defendant was
guilty [illegible] negligence, was one of fact for the
determination of the jury; and it was also the province of
the jury from the evidence whether or not plaintiff
was guilty [illegible] negligence.
[illegible] two conflicting elements, viz.: whether or
not defendant was guilty of negligence which was
the proximate cause of plaintiff's injuries; and whether or
not plaintiff was guilty of contributory negligence, were
determinable in favor of the plaintiff. From a patient
examination of the record, we cannot say that such verdict
was clearly and manifestly against the weight of the evidence,

although it must be conceded that the evidence was close and conflicting in some respects. Nor can we say that the evidence is insufficient to sustain the verdict.

2. The chief argument advanced by defendant on the question of damages is predicated on the fact that no witness testified positively that the use of plaintiff's left hand was impaired as a result of the fracture to his collar bone which he received from the fall to the pavement.

One expert witness who made an examination of the plaintiff a long time after the accident, testified that in his opinion the crippled condition of the hand was permanent, and that it probably resulted from an abscess which he found in the left arm pit.

The evidence shows that plaintiff had to undergo an operation of the collar bone immediately after the accident, following which the abscess in question formed; and that shortly thereafter plaintiff discovered that the fingers of his left hand resisted a firm closure. Plaintiff testified that prior to the injury to his collar bone, he had never had any trouble with his shoulder or arm, and that he had theretofore always enjoyed the full use of his left hand.

While we concede that it is rather problematical as to just what caused the disability of plaintiff's hand, yet in view of all the testimony, this question was properly submitted to the jury as one of fact. Such procedure was upheld in C. U. T. Co. v. May, 221 Ill. 530, where the court was confronted with a situation somewhat akin to that in the case at bar.

It also appeared from the evidence that plaintiff was totally incapacitated for about seven months following the injury; that subsequently he was unable to follow his trade of carpenter because of the fact that he could not close

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was total incapacitated for about seven months following
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affirmed the jury verdict. [illegible] Such procedure was
not in variance with the testimony, this question was properly
for the jury to determine as one of fact. [illegible] such procedure was
before us and was the full use of his left hand.
We are convinced that it is rather preponderant
any reasonable mind, and that he had therefore
that burden of injury to his collar bone, he had never had
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left [illegible] as a result of the fractures to his
without doubtedly that the use of plaintiff's
the [illegible] is predicated on the fact that no
[illegible] impairment advanced by defendant on
evidence [illegible] to warrant the verdict.
and [illegible] not [illegible]. Nor can we say that the
although [illegible] said that his [illegible] alone

his left hand sufficiently to hold a nail; that consequently he was obliged to accept other employment at a considerably reduced salary.

Great stress is laid upon the fact that for several years prior to the accident plaintiff had not been pursuing the carpenter trade, but was doing other work, at a lower remuneration than that usually paid a carpenter. There is testimony in the record to the effect that plaintiff accepted temporary employment in another capacity because of the scarcity of work in the carpenter trade at that time. But there is no evidence in the record from which it can be said that this change of employment was intended to be permanent. On the contrary, we have the testimony of plaintiff that a few days prior to the mishap he had started to work as a carpenter. Having never abandoned his regular trade, plaintiff's ability to pursue it was properly taken into consideration by the jury in estimating the damages. To hold otherwise would be to penalize a person for changing his employment under the stress of economic conditions.

In view of the foregoing, we cannot say that the damages awarded by the jury were excessive.

3. The giving of instruction No. 5 on behalf of plaintiff is complained of because, it is contended, it limits plaintiff's exercise of care to the time of the happening of the accident, whereas it should have included the time just preceding it as well.

This instruction told the jury that if they believed from the evidence that plaintiff was injured while in the exercise of ordinary care for his own safety, provided they believed that he was blameless of any contributory negligence, and that he was injured as a result of negligence on the part of defendant as charged in the declaration, they

should find for the plaintiff. In our opinion, this instruction was neither erroneous nor misleading. The words, "while in the exercise of ordinary care," are sufficiently comprehensive to include the time just preceding the accident. C. & A. R. R. Co. v. Fisher, 141 Ill. 614; Punsteri v. C. C. Ry. Co., 156 Ill. App. 578.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

137 - 22562

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HARRY HILL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

205 I.A. 632

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was arrested on a charge of vagrancy, tried and found guilty, and sentenced to serve a term of six months in the house of correction.

An examination of the record discloses a total lack of evidence on the part of the prosecution to prove that plaintiff in error was without lawful means of support at and prior to the time of the conviction.

Plaintiff in error testified that for several weeks prior to his arrest he was lawfully employed and was receiving a salary of twenty dollars per week for his services. In this he was corroborated by the testimony of his employer.

It has been repeatedly held by this court that to establish the offense of vagrancy, affirmative proof that defendant was without lawful means of support is indispensable. People v. Sweeney, 185 Ill. App. 340; People v. Warren, 185 Ill. App. 341; People v. Norton, 185 Ill. App. 342.

The prosecution having failed to make the requisite proof, the judgment will be reversed.

REVERSED.

libel, the judgment will be entered.

ORDERED.

373 - 22328

JOHN C. GIFFORD, Appellant,

vs.

SMITH H. BRACNY, Appellee.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

205 I.A. 633

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

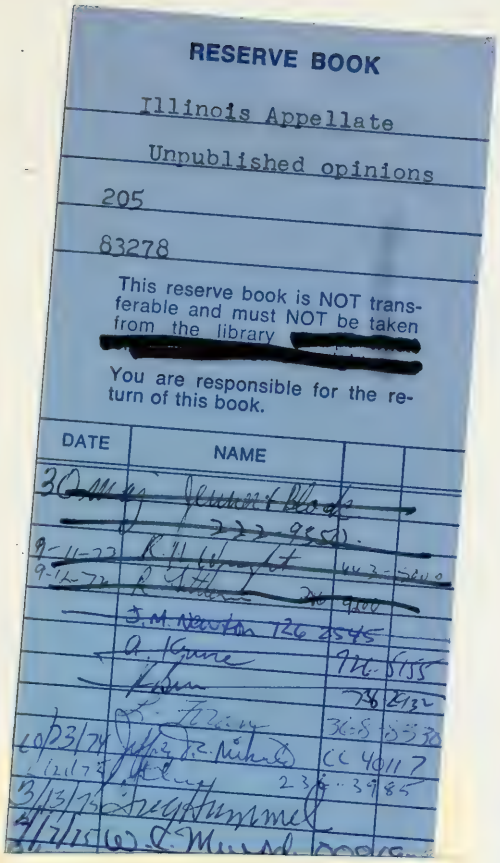
This was a suit brought to recover on a contract for the purchase of a $1,000 bond, with interest, resulting in a finding and judgment for defendant. Plaintiff appeals. Evidence was adduced in plaintiff's behalf only. If it be conceded that defendant was liable for the purchase of the bond under the contract in question, still there was no evidence to show a tender of the bond prior to the bringing of the suit.

Plaintiff pleaded performance on his part and was bound to prove performance as alleged. Plaintiff relies upon waiver of performance. Waiver was not pleaded, nor does the evidence tend to show any waiver of the delivery of the bond. Waiver cannot be relied upon unless pleaded. A party cannot aver in his declaration a full performance of the contract and recover under waiver of performance. Thompson v. Hoppert, 120 Ill. App. 588; Shultz v. Miller-Hamilton et al., 189 Ill. App. 396. Plaintiff's own evidence shows that his attorney went to defendant and asked him if he acknowledged his liability on the bond. Defendant replied that he did, but he was not then able to pay same. Thereupon plaintiff, as the record states, offered him two $500 bonds, (in lieu of one bond of $1000), and gave him one of

such bon, at defendant's request, to read. The defendant did not fuse to accept the bonds. The evidence does not show an tual offer by plaintiff of (a) a delivery of the bonds t efendant or (b) to leave them in defendant's possessn. On the contrary, the evidence shows that plainti retained the bonds and did not make a formal tender same until after the instant suit was begun.

The burden was on plaintiff to show performance of the ntract on his part as pleaded. This he failed to do. The judgment of the County Court will therefore be affirm.

AFFIRMED.



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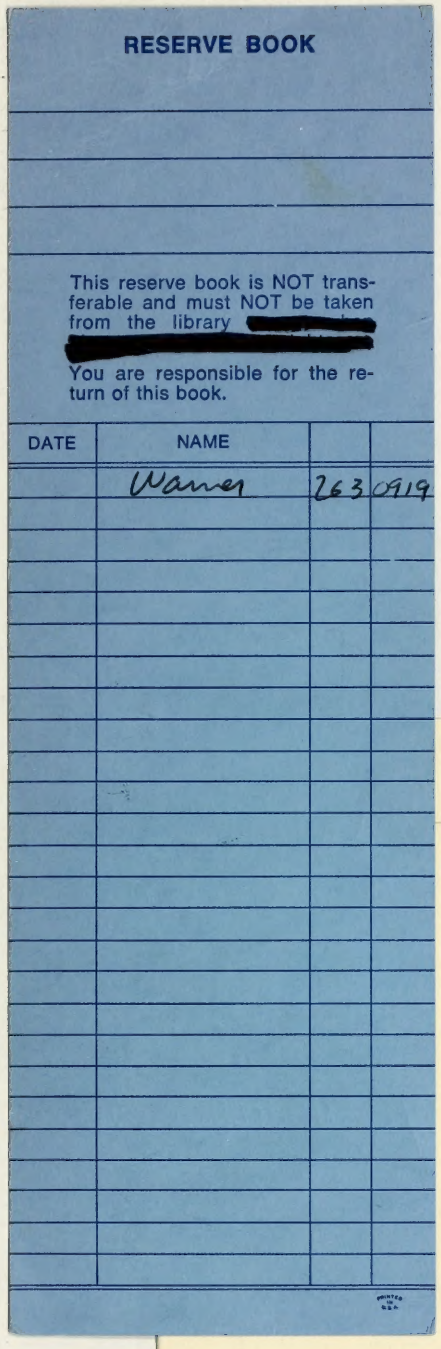
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